Study K-402 November 23, 2016

Memorandum 2016-59

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Possible Additional Reforms to Include in the Tentative Recommendation

The Commission is in the process of preparing a tentative recommendation that would propose a new exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128), which would address "attorney malpractice and other misconduct." As directed by the Commission, Memorandum 2016-58 presents draft legislation to create such an exception and discusses related drafting issues.¹

In September, the Commission also asked the staff to "prepare a memorandum that discusses the possibility of including additional reforms in the tentative recommendation, either as complements to the proposed new mediation confidentiality exception or as possible alternatives."² This memorandum addresses that topic.

The following materials are attached for the Commission's consideration:

		Exhibit p.
•	CLRC staff, Compilation of Possible Approaches (2-page summary)	1
•	CLRC staff, Compilation of Possible Approaches (full chart)	3
•	CLRC Memorandum 2015-34 (Scope of Study)	36
•	Robert Flack, Dec 1 Los Angeles (Thurs) CLRC Mediation Confidentiality Hearing (11/1/16)	49
•	Ron Kelly, Berkeley (10/13/16)	
	John Warnlof, Acknowledgments Concerning Mediation Confidenti	

^{1.} Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

^{2.} *Draft* Minutes (Sept. 2016), p. 5.

SCOPE OF DISCUSSION

As the staff understands it, the Commission wants to examine the possibility of including multiple reforms in its tentative recommendation:

- The new mediation confidentiality exception that it has been working on for the past year, and
- One or more additional reforms, which could either supplement the proposed new exception or be an alternative to it.

Such a multi-prong approach is not unprecedented. For example, the Commission's discussion draft (functionally equivalent to a tentative recommendation) on *Exemptions From Enforcement of Money Judgments: Second Decennial Review* included a package of several substantive reforms that *complemented* each other.³ That type of package is fairly common in the Commission's work; less frequently, it has solicited input on several *alternative* approaches. Its tentative recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing* is an example of the latter situation.⁴

^{3.} The discussion draft included three different substantive reforms: (1) proposed monetary adjustments of personal property enforcement of judgment exemption amounts, (2) a proposed mechanism for automatic cost-of-living adjustments of these exemption amounts on a triennial basis in the future, and (3) proposed monetary adjustments of special exemption amounts for reimbursement of county aid. See Discussion Draft on *Exemptions From Enforcement of Money Judgments: Second Decennial Review* (Sept. 2002). All of these reforms were enacted (with minor revisions). See 2003 Cal. Stat. ch. 379.

^{4.} The tentative recommendation described four possible approaches to California's hearsay exception on forfeiture-by-wrongdoing. The Commission ruled out one approach (due to a lack of definitive judicial guidance) and solicited input on the remaining three, mutually exclusive approaches: (1) replace the existing provision with one similar to the federal rule, (2) broaden the existing provision to a limited extent, with the possibility of further revisions later, and (3) leave the law alone until there is further judicial guidance. See Tentative Recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing* (Oct. 2007).

After the Commission issued the tentative recommendation, the United States Supreme Court accepted review in a key case, but it was clear that the Court would not decide the case until after the Commission's report was due. The Commission therefore submitted a final recommendation advising the Legislature to "take no action on forfeiture by wrongdoing until after the United States Supreme Court issues the forthcoming decision." *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm'n Reports 443, 447 (2007).

A somewhat similar example is the Commission's Tentative Report on *Charter Schools and the Government Claims Act* (June 2011), which discussed the advantages and disadvantages of a range of possible reform alternatives, but made no recommendation on which approach would strike the best policy balance. After circulating the tentative report for comment, the Commission issued a final report that was very similar. It explained that "[e]ach of the alternatives discussed involves competing policy considerations, which would best be weighed by the elected representatives of the public (with the benefit of the Commission's analysis), rather than by the Commission." *Charter Schools and the Government Claims Act*, 42 Cal. L. Revision Comm'n Reports 224, 227-28 (2012).

In deciding to explore the possibility of including additional reforms in the tentative recommendation for the current study, a number of Commissioners expressed interest in reexamining the staff's *Compilation of Possible Approaches*, which the Commission originally considered at the August 2015 meeting.⁵ That table is attached for convenient reference (Exhibit pp. 3-35), along with a 2-page summary of the many options described in it (Exhibit pp. 1-2).

When the staff prepared the table, we tried to include all of the options that had surfaced (in one way or another) in the course of the Commission's study. A few more ideas have come to the Commission's attention since then (aside from the filtering options that the Commission rejected). In addition, the Commission recently received an "Alternative Compromise Package" from mediator Ron Kelly.

Although there are many possible options, this memorandum only discusses some of them. The staff used a number of criteria to determine which options to discuss.

First, many of the options (particularly those in Category A of the *Compilation of Possible Approaches*⁸) are variants on the general concept of creating a mediation confidentiality exception to promote attorney accountability for misconduct. The Commission has spent the past year considering the details of how to draft such an exception. Based on discussion at the September meeting, barring special circumstances, this memorandum does not discuss options that would involve revisiting the Commission's decisions about the contours of the exception (e.g., whether to use an *in camera* approach; whether to address misconduct of an attorney-mediator).

Second, careful examination of the resolution relating to this study and its legislative history "strongly suggests that the Legislature intended for the Commission to study and provide a recommendation on the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in the mediation process, including, but not limited to,

^{5.} See Memorandum 2015-33, Attachment pp. T1-T33 (attached hereto as Exhibit pp. 3-35).

^{6.} See, e.g., First Supplement to Memorandum 2015-36, Exhibit pp. 1-38 (comments of Deborah Blair Porter); Memorandum 2015-45, Exhibit pp. 11-15 (comments of Paul Dubow), 27 (comments of Shawn Skillin); Memorandum 2016-30, pp. 15-16 (describing suggestions in blog post by Phyllis Pollack) & Exhibit p. 17 (comments of Lynnette Berg Robe); Second Supplement to Memorandum 2016-50, Exhibit pp. 6-8 (comments of Herring Law Group, on behalf of client).

^{7.} See Exhibit pp. 51-53.

^{8.} See Exhibit pp. 1, 3-21.

legal malpractice."9 The staff memorandum explaining that conclusion is attached for convenient reference (Exhibit pp. 36-48).

Some of the options in the *Compilation of Possible Approaches* are not closely tied to the assigned topic. For example, General Approach B-7 is to "[r]evise the mediation confidentiality statutes to expressly address the use of mediation communications in a juvenile delinquency case."10 Although such a reform would be within the Commission's authority, 11 it would not predominately relate to the study at hand. This memorandum does not discuss it or other reforms that would stray from the primary focus of this study. 12

Lastly, some of the options in the Compilation of Possible Approaches have generated considerable interest, such as the concept of requiring a pre-mediation disclosure regarding mediation confidentiality and its potential impact on a legal malpractice claim (or similar information). Category C in the Compilation of Possible Approaches collects suggestions that would entail informational disclosures.¹³

In contrast, some of the other options have generated little to no interest. This memorandum concentrates on suggestions that have garnered at least some degree of interest. Although the memorandum omits some suggestions on this basis, it is not intended to limit the discussion at the upcoming meeting. If a person wants to raise another idea for consideration (whether previously suggested or otherwise), that person is welcome to do so.

^{9.} Memorandum 2015-34, p. 8 (boldface and emphasis in original).

^{10.} See Exhibit pp. 1, 25.

^{11.} See Memorandum 2015-34, pp. 8-10 (attached hereto as Exhibit pp. 36-38).

^{12.} See, e.g., General Approach B-6, discussed at Exhibit pp. 1, 24 (clarify meaning of Evid. Code § 1119(c) making mediation communications "confidential"); General Approach B-8 discussed at Exhibit pp. 1, 25 (revise Evid. Code § 1120(a)(3) re disclosure of mediator's prior mediations); General Approach D-6, discussed at Exhibit pp. 2, 34 (develop mediator regulation gratery for Colifornia); General Approach D-7, discussed at Exhibit pp. 2, 35 (develop mediator regulation gratery for Colifornia); General Approach D-7, discussed at Exhibit pp. 2, 35 (develop mediator regulation gratery for Colifornia); General Approach D-7, discussed at Exhibit pp. 2, 35 (develop mediator regulation gratery). system for California); General Approach D-7, discussed at Exhibit pp. 2, 35 (require mediation to take place within 30 days of filing of lawsuit); General Approach D-8, discussed at Exhibit pp. 2, 35 (prohibit person from serving as mediator and referee in same case).

General Approach B-2 (discussed at Exhibit pp. 1, 23) is to enact the Uniform Mediation Act ("UMA") in California. The UMA addresses many aspects of mediation confidentiality, not just allegations of attorney misconduct in a professional capacity in the mediation context. The Commission has closely considered the aspects of the UMA that are most pertinent to this study (see General Approach A-3 and General Approach A-8, discussed at Exhibit pp. 1, 6, 13-14). For that reason, and because other aspects of the UMA are further afield from the topic at hand, this memorandum does not discuss any reforms relating to the UMA.

^{13.} See Exhibit pp. 2, 27-32.

OUTLINE

The remainder of this memorandum is organized as follows:

- (1) Disclosure requirements.
- (2) Revise the law on waiving mediation confidentiality or modifying it by agreement.
- (3) Safeguards against attorney misconduct in the mediation process.
- (4) Empirical study.
- (5) Ron Kelly's "Alternative Compromise Package."
- (6) Prepare a report with no recommendation or a recommendation to leave the law as is.

In assessing the merits of these possible reforms, the Commission should **bear** in mind and consider how to balance the competing policy interests at stake in this study, most notably (1) the benefits of mediation confidentiality in facilitating effective dispute resolution and (2) the interest in holding attorneys accountable for professional misconduct in the mediation context. As before, the staff takes no position on that controversial matter, but raises technical and similar concerns and identifies relevant considerations where that appears appropriate. The key policy decisions should be made by the Commission (and ultimately the Governor and the Legislature, as the elected representatives of the public).

As for whether the Commission should include multiple reforms in its tentative recommendation (not just its proposed new exception to mediation confidentiality), there are a number of factors to consider, such as:

- Would a suggested reform complement the Commission's proposed new exception, such that enactment of both reforms may help better achieve the Commission's policy objective?
- Would a suggested reform be an alternative to the Commission's proposed new exception? If so, would there be any potential harm in proposing both ideas simultaneously (e.g., an adverse consequence of advancing inconsistent reasoning)? Is there any way to minimize the likelihood of such harm?
- From an efficiency and timing standpoint, would it be advantageous to test multiple alternatives in a single tentative recommendation (or multiple tentative recommendations, issued

^{14.} For a more complete discussion of the relevant policy interests, see Memorandum 2014-6. See also Memorandum 2015-5 (examining empirical evidence and difficulties in obtaining reliable data).

^{15.} See Memorandum 2015-33, p. 4; see also Memorandum 2016-29, p. 14.

simultaneously), rather than proposing only one reform and perhaps having to start again from scratch if that proposal does not work out?

In considering this point, it may be useful to recall that the Commission occasionally proposes a law reform that proves problematic, then later successfully proposes a different reform on the same topic. The lag time varies depending on the circumstances.¹⁶

Commissioners should **keep these factors in mind** when reading the remainder of this memorandum.

DISCLOSURE REQUIREMENTS

Many sources have raised the possibility of statutorily requiring that certain information be provided to a party before the party decides whether to mediate.¹⁷ Those sources have referred to the concept in different ways, such as

16. For example, see the following:

• Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture, 37 Cal. L. Revision Comm'n Reports 149 (2007) (not enacted); Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture, 41 Cal. L. Revision Comm'n Reports 265 (2011) (enacted as 2012 Cal. Stat. ch. 470).

- Tentative Recommendation on *Statutory Clarification and Simplification of CID Law* (June 2007) (superseded); Tentative Recommendation on *Statutory Clarification and Simplification of CID Law* (Feb. 2010); *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 295 (2010) (enacted as 2012 Cal. Stat. ch. 180).
- Tentative Recommendation on *Trial Court Unification: Publication of Legal Notice* (Sept. 2014) (superseded); Revised Tentative Recommendation on *Trial Court Unification: Publication of Legal Notice* (June 2015); *Trial Court Unification: Publication of Legal Notice*, __ Cal. L. Revision Comm'n Reports __ (2015) (enacted as 2016 Cal. Stat. ch. 703).

17. See, e.g., First Supplement to Memorandum 2013-39, Exhibit p. 2 (comments of Nancy Yeend); Memorandum 2013-47, Exhibit pp. 28-29 (comments of Gary Weiner); First Supplement to Memorandum 2013-47, Exhibit pp. 2-3 (comments of Ass'n for Dispute Resolution of Northern California), 4 (comments of Sidney Tinberg); Second Supplement to Memorandum 2013-47, Exhibit p. 9 (comments of Jerome Sapiro, Jr.); Third Supplement to Memorandum 2013-47, Exhibit pp. 3-4 (article by Nancy Yeend & Stephen Gizzi); Memorandum 2014-60, Exhibit p.1 (comments of Nancy Yeend); Memorandum 2014-6, Exhibit pp. 1-2 (comments of Ron Kelly), 15 (comments of Nancy Yeend); First Supplement to Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason); Memorandum 2015-24, pp. 3-4 & Exhibit p. 3 (comments of Nancy Yeend); First Supplement to Memorandum 2015-36, Exhibit pp. 23-24, 26 (comments of Deborah Blair Porter); Memorandum 2015-45, Exhibit pp. 11 (comments of Paul Dubow), 27 (comments of Shawn Skillin); Memorandum 2015-46, Exhibit p. 126 (comments of Scott O'Brien); First Supplement to Memorandum 2015-46, Exhibit pp. 39 (comments of Nancy Yeend); First Supplement to Memorandum 2015-54, Exhibit pp. 39 (comments of Lynnette Berg Robe), 14-15 (comments of Hon. Keith Clemens, ret.); Memorandum 2016-30, p. 30 (discussing blog post by Phyllis Pollack) & Exhibit p. 17 (comments of Herring Law Group, on behalf of client); First Supplement to Memorandum 2016-50, Exhibit pp. 14-37 (comments of Robert Flack); Exhibit p. 49 (article by Robert Flack).

"written notifications," 18 "informed consent," 19 "safe harbor mediation agreements,"20 "a standard list of admonitions,"21 and a "warning to the parties."22 As Category C in the Compilation of Possible Approaches reflects, the suggestions also differ in content, with many variations.

Any disclosure requirement should address the following matters:

- What must be disclosed?
- Who must make the disclosure to whom?
- When must the disclosure be made?
- In what manner must the disclosure be made?
- What are the consequences of making the disclosure? What are the consequences of failing to make the disclosure?
- Given existing mediation confidentiality protections, how will a mediation participant be able to establish whether the disclosure was made?

Those points are discussed below, with illustrations from the suggestions received.

What Must Be Disclosed?

Perhaps the most critical issue with regard to any disclosure requirement is deciding precisely what must be disclosed. The Commission has received a broad range of suggestions on that point.

Some of those suggestions focus on prevention of mediator misconduct, rather than attorney misconduct.²³ Consistent with the scope of this study, we do not discuss them further here.

See also Memorandum 2014-43, pp. 13-14 (describing points raised in article by Pa. lawyer Abraham Gafni); Memorandum 2015-35, pp. 36-39 (summarizing scholarly views on informing mediation participants about extent of mediation confidentiality); Wimsatt v. Superior Court, 152 Cal. App. 4th 137, 163, 61 Cal. Rptr. 3d 200 (2007) ("In light of the harsh and inequitable results of the mediation confidentiality statutes ..., the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute."); A. Marco Turk, Relax, It was Part of Mediation, S.F. Daily Journal (Aug. 17, 2015) ("It would seem that the [Cassel] problem can be solved by ... approaches that inform all involved with the mediation, concerning the consequences of the confidentiality protection.").

^{18.} Second Supplement to Memorandum 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client).

^{19.} First Supplement to Memorandum 2015-46, Exhibit p. 57 (comments of Nancy Yeend).

^{20.} Exhibit p. 49 (article by Robert Flack).

Memorandum 2016-30, Exhibit p. 17 (comments of Lynnette Berg Robe).
 Memorandum 2015-45, Exhibit p. 11 (comments of Paul Dubow).
 See, e.g., bulletpoints #1 and #6 in General Approach C-4 (Exhibit p. 28), which would require a mediator to (a) disclose matters that could raise a question about a mediator's ability to conduct the mediation impartially, and (b) inform all participants that the mediator will not

The following disclosure requirements may, to varying extents, address the possibility of attorney misconduct in the mediation process:

- Disclose that California's mediation confidentiality statute could prevent introduction of evidence that an attorney engaged in misconduct in a mediation,²⁴ including evidence of private discussions between an attorney and a client relating to a mediation.²⁵
- Disclose that California's mediation confidentiality statute might prevent a client from pursuing a claim against an attorney for committing malpractice in a mediation.²⁶

represent any participant as a lawyer or perform any professional services in any capacity other than as an impartial mediator.

See also First Supplement to Memorandum 2016-50, Exhibit pp. 17-37 (collection of mediation agreements from Robert Flack, which address range of topics, including some that are beyond scope of this study).

24. See Nancy Yeend & Stepen Gizzi, Mediation Confidentiality: A Malpractice Exception or Not?, p. 4 (Oct. 2013) (The "state law sheltering evidence of attorney malpractice must be disclosed to clients ..., in order to enable clients to provide valid 'informed consent' to the process."). This

article is reproduced in Memorandum 2013-37, Exhibit pp. 3-6.

25. See Memorandum 2015-45, Exhibit p. 11 (Paul Dubow's suggestion that attorneys should "be required to advise clients in writing when recommending mediation that conversations between them made during the course of the mediation will not be admissible should the client sue the attorney for malpractice committed during the mediation."); First Supplement to Memorandum 2015-46, Exhibit p. 53 (Robert Sall's suggestion to disclose that "if you are invited to attend a mediation, and you agree to do so, you should understand that you will not be able to use any evidence related to that mediation in the event that you later decide to pursue a claim against Attorneys relating to the events or communications that took place regarding that mediation."). Similarly, Prof. A. Marco Turk says:

[T]here are alternative solutions [to *Cassel*] that would not jeopardize the heart of the mediation process. One example would be including the following clause in confidentiality agreements that the parties sign: "No written or oral communication made by any party, attorney, mediator, or other participant in any mediation session in this case may be used for any purpose in any pending or future proceeding unless all parties, including the mediator, expressly so agree. This prohibition *extends to and includes* private attorney-client communications that occur outside the presence or hearing of the mediator or any other mediation participant. Such attorney-client communications, like any other communications, are confidential, and therefore are neither discoverable nor admissible for any purpose insofar as they were 'for the purpose of, in the course of, or pursuant to, mediation.'"

A. Marco Turk, Relax, It was Part of Mediation, S.F. Daily Journal (Aug. 17, 2015) (emphasis in original)

26. This is General Approach C-1 in the *Compilation of Possible Approaches*. See Exhibit pp. 2, 27. See also Second Supplement to Memorandum 2013-47, Exhibit p. 9 (suggestion from Jerome Sapiro, Jr., that "lawyers should be obliged to disclose to their clients that, if the client agrees to mediate, then the lawyer is immune regarding anything the lawyer does or says during or related to mediation."); Memorandum 2014-6, Exhibit p. 15 (suggestion from Nancy Yeend that the Commission recommend "an explicit requirement mandating disclosure of the fact that malpractice is protected"); First Supplement to Memorandum 2015-46, Exhibit p. 57 (comments of Nancy Yeend) (same); Memorandum 2014-60, Exhibit p. 1 (comments of Nancy Yeend) (same); First Supplement to Memorandum 2015-54, Exhibit p. 14 (Judge Keith Clemens' comment that "[r]ather than overturn mediation confidentiality, perhaps the law could require that parties be advised ... that mediation confidentiality will mean that if the party participates in mediation, that party might not be able to pursue a legal malpractice claim against their own

- Disclose examples of legal malpractice that might occur in a mediation.²⁷
- Disclose that in *Cassel v. Superior Court*, the California Supreme Court interpreted the mediation confidentiality statute strictly, allowing exceptions only in rare circumstances.²⁸
- Disclose that any modification of an attorney-client fee agreement during a mediation must be put in a signed writing or otherwise properly memorialized to be enforceable.²⁹
- Disclose that parties can "reserve the right to have the statements made by their attorneys and the mediator admissible in a lawsuit against an attorney for malpractice³⁰

attorney in that case."); Second Supplement to Memorandum 2016-50, Exhibit p. 8 (suggestion from Herring Law Group, on behalf of client, to require pre-mediation presentation of written notifications that inform parties of existence, scope, and potential ramifications of mediation confidentiality, such as warning that "post-settlement discoveries of misrepresentations, omissions, or fraud that might have been committed prior to or in mediation could be impossible to investigate or rectify.").

27. See First Supplement to Memorandum 2014-60, Exhibit p. 1 (Edward Mason's suggestion to require disclosure of "examples of malpractice that the average person can understand and recognize if it is occurring in the process."); First Supplement to Memorandum 2015-36, Exhibit pp. 23-24 (Deborah Blair Porter's suggestion to provide detailed information about mediation process, including "[e]xemplars of potential problems that could arise, including ... that an attorney should not be negotiating for themselves or against the client's interests; what forms duress and/or intimidation might take in the mediation process; fee and payment issues, etc."). This is General Approach C-2 in the Compilation of Possible Approaches. See Exhibit pp. 2, 28.

28. More specifically, the suggestion is that mediation participants should receive a "Mediation Information Sheet" that contains the applicable statutes, points out that the California Supreme Court "has decided several very important cases interpreting these statutes," and says that the most recent such case, *Cassel v. Superior Court*, begins as follows:

In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. With specified statutory exceptions, neither "evidence of anything said," nor any "writing," is discoverable or admissible "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which ... testimony can be compelled to be given," if the statement was made, or the writing was prepared, "for the purpose of, in the course of, or pursuant to, a mediation" (Evid. Code, § 1119, subds. (a), (b).) "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation ... shall remain confidential." (*Id.*, subd. (c).) We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected.

See Memorandum 2013-47, Exhibit pp. 28-29 (comments of Gary Weiner).

29. See Memorandum 2015-45, p. 25 ("Require the mediator and/or counsel to inform all mediation participants at the start of each mediation that any adjustment of an attorney-client fee agreement during a mediation must be properly memorialized in a writing, or in an oral recording meeting specified requirements, if it is to be effective."); Memorandum 2016-30, Exhibit p. 17 (Lynnette Berg Robe's suggestion that clients considering mediation should be informed that "[i]f, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is an agreement to enhance the attorney's fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys."); see also General Approach C-11 (Exhibit pp. 2, 31).

30. Memorandum 2013-47, Exhibit p. 28.

- Disclose basic information about mediation confidentiality.³¹
- Disclose that (1) any resolution of the dispute in mediation requires a *voluntary* agreement of the parties³² and (2) any party may withdraw from the mediation process at any time for any reason.³³
- Disclose information on the nature of the mediation process, the procedures to be used, and the roles of the mediator, the parties, and the other participants.³⁴

Another idea is to require that mediation clients receive an "Information and Caution on Mediation Confidentiality," as follows:

31. For example, see Exhibit p. 54. Mediator John Warnlof uses this form in his mediations. See Exhibit p. 28.

For similar suggestions, see First Supplement to Memorandum 2015-36, Exhibit pp. 23-24 (Deborah Blair Porter's suggestion to provide detailed information about mediation process, including information about confidentiality); Memorandum 2015-45, Exhibit p. 27 (Shawn Skillin's suggestion to "require the mediators ... to explain confidentiality, ... to give clients a basic explanation of their basic rights under the law."); Memorandum 2015-46, Exhibit p. 126 (Scott O'Brien's suggestion to protect against attorney misconduct "by requiring mandatory disclosures regarding confidentiality in mediation"); Memorandum 2016-30, p. 15 (describing blog post in which Phyllis Pollack suggests that attorney should inform and advise client about mediation confidentiality, especially its rules of inadmissibility, before mediation). See also First Supplement to Memorandum 2016-50, Exhibit pp. 17-37 (collection of mediation agreements from Robert Flack, which address range of topics, including mediation confidentiality rules).

Along the same lines, bulletpoints #2 and #3 in General Approach C-4 (Exhibit p. 28) would require every mediator (not just a mediator in a court-connected mediation) to provide (a) a general explanation of the mediation confidentiality rules and (b) a description of the mediator's practice regarding confidentiality for separate caucuses held during mediation. See also Memorandum 2013-47, Exhibit p. 28 (Gary Weiner explaining that this type of disclosure requirement is worth considering because mediators in court-connected mediation must already provide general explanation of mediation confidentiality rules).

32. See bulletpoint #4 in General Approach C-4 (Exhibit p. 28). See also First Supplement to Memorandum 2016-50, Exhibit pp. 17-37 (collection of mediation agreements from Robert Flack, which address range of topics, including rule that mediation agreement must be voluntary).

33. See First Supplement to Memorandum 2016-50, Exhibit pp. 17, 31, 33, 37 (mediation agreements from Robert Flack, which include information on right to withdraw from mediation). 34. See bulletpoint #5 in General Approach C-4 (Exhibit p. 28).

For similar suggestions, see First Supplement to Memorandum 2013-47, Exhibit pp. 2-3 (comments of Ass'n for Dispute Resolution of Northern California, advocating clear disclosure of "the potential benefits, limitations, and disclaimers associated with mediation"); First Supplement to Memorandum 2015-36, Exhibit pp. 23-24 (Deborah Blair Porter's suggestion to provide detailed information about mediation process); Memorandum 2016-30, Exhibit p. 17 (Lynnette Berg Robe's suggestion to create "a standard list of admonitions written in plain English that attorneys and mediators can give to any client who indicates that he or she is interested in mediation, addressing the downside of participating in mediation as well as the benefits, and ensuring informed consent to the mediation process."). See also First Supplement to Memorandum 2016-50, Exhibit pp. 17-37 (collection of mediation agreements from Robert Flack, which address range of topics, including explanation of mediation process).

INFORMATION AND CAUTION ON MEDIATION CONFIDENTIALITY

- **1. Summary of California Mediation Confidentiality Law.** To promote communication in mediation, California Evidence Code sections 703.5 and 1115-1128 establish the confidentiality and limit the disclosure, admissibility, and court's consideration of communications, writings, and conduct in connection with a mediation. In general, they provide:
- a. All communications, negotiations, or settlement offers in the course of a mediation must remain confidential;
- b. Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings;
- c. A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body; and
- d. A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at or in connection with a mediation.
- **2. CAUTION.** This means you cannot rely on statements made in mediation. They can't be admitted in evidence in any later non-criminal proceeding UNLESS they are part of a written settlement agreement AND your settlement agreement is signed by all necessary parties and states that you want it to be an enforceable agreement (or words to that effect see California Evidence Code section 1123).

3. Examples.

You cannot rely on statements from the other side such as

"You need to accept much less money than you believe is fair because I only have the following assets and would declare bankruptcy if we went to court" UNLESS you include this list of assets in your settlement agreement and make the accuracy of the list a condition of your settlement.

You cannot rely on statements from your own lawyer such as

"If you accept the proposed settlement, I (your lawyer) will reduce my legal fees by this amount"

UNLESS you ensure this is included in your settlement agreement.

Mediator Ron Kelly supports this idea,³⁵ which was part of a detailed form in a 2005 proposal by the Civil and Small Claims Advisory Committee of the Judicial Council.³⁶

For the most part, the foregoing suggestions assume that California's mediation confidentiality rules will remain as is, with no new exception created. In general, then, they would be *alternatives* to the proposed new exception, not *supplements* to it.

^{35.} See Exhibit pp. 29, 51.

^{36.} See Memorandum 2015-22, pp. 31-34 & Exhibit pp. 28-29. This is General Approach C-5 in the *Compilation of Possible Approaches* (see Exhibit pp. 2, 29).

But that is not invariably so. In particular,

- (1) Some of the disclosure suggestions might be appropriate and useful even if California were to enact a mediation confidentiality exception that addresses attorney misconduct. For example, there would not be any inconsistency between (a) the Commission's proposed new exception and (b) a statutory requirement to inform mediation participants that a mediated settlement agreement must be voluntary. Such a disclosure requirement might serve to reinforce the Commission's policy objectives.
- (2) If California were to enact a mediation confidentiality exception addressing attorney misconduct, perhaps an attorney or mediator should be statutorily required to inform mediation participants that the exception exists. Otherwise, a mediation participant might make a damaging statement during a mediation, without realizing that the statement could be subject to later disclosure. Scholars appear to universally agree that mediation participants "need to know that there are limits on confidentiality and that everything said in mediation is not necessarily privileged."³⁷
- (3) Memorandum 2016-58 discusses the possibility of making the Commission's proposed new exception inapplicable to certain types of mediations, such as family law mediations³⁸ or community-based mediation programs funded under the Dispute Resolution Programs Act ("DRPA").³⁹ If the Commission exempts a particular type of mediation from the new exception, mandatory disclosures about the potential difficulty of proving malpractice (or similar disclosures) might be warranted in those mediations only.

Who Must Make the Disclosure to Whom? When Must the Disclosure Be Made?

Any disclosure requirement should specify who is responsible for making the disclosure, who is to receive the disclosure, and when the disclosure must be made. We discuss those points together, because they are interrelated.

In the context at hand, it seems clear that any mandatory disclosure of information about mediation confidentiality (or the like) should be *directed to the disputants*. In a mediation setting, they are the ones who are likely to be unfamiliar with the process, the confidentiality rules, and the potential consequences of those rules. Further, the purpose of conducting the mediation is to resolve their dispute. Other participants (such as attorneys, experts, and the

^{37.} Maureen Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. Tex. L. Rev. 943, 944 (2008). For further discussion of this point, including quotations from and citations to other scholarly works, see Memorandum 2015-35, pp. 36-39.

^{38.} See Memorandum 2016-58, pp. 30-33.

^{39.} See Memorandum 2016-58, pp. 26-30 & Exhibit pp. 11-14.

mediator) are generally persons with expertise who are being paid to assist the disputants in that endeavor, not to serve their own interests. In short, it is the disputants who need the help that a mandatory disclosure about mediation confidentiality would provide.

In deciding who should have to make the disclosure, the obvious candidates are the attorneys or the mediator. Some of the commenters in this study would place the disclosure burden on the mediator. For example, mediator Gary Weiner considers it *a mediator's duty* to provide certain information to the parties."⁴⁰

Other commenters suggest that the burden of making a required disclosure about mediation confidentiality belongs on attorneys. For example, mediator Paul Dubow proposes that "[a]ttorneys would be required to advise clients ... that conversations between them made during the course of the mediation will not be admissible should the client sue the attorney for malpractice committed during the mediation."⁴¹

As mediator John Warnlof explained at the Commission meeting in April 2015, the issue (attorney vs. mediator) involves a matter of timing. He urged the Commission to place the burden of disclosure on attorneys, because disputants should be made aware of the mediation confidentiality rules *before* they meet the mediator at a face-to-face mediation session.

That view seems to make sense, because California's mediation confidentiality statute protects mediation consultations and preparations for a mediation session, not just the mediation session itself. ⁴² It might be important, for instance, for a client to know that an attorney's misstatement in a premediation strategy session would not be admissible in a legal malpractice case. Similarly, learning about the potential implications of mediation confidentiality sooner rather than later might affect a client's decision on whether to mediate. Because the attorney-client relationship is generally in place well before a client has any direct contact with a mediator, an attorney probably would be better-situated than a mediator to disclose statutorily required information about mediation confidentiality to a client early in the mediation process, preferably before the client commits to mediating.

But what if a disputant has no attorney? If *all* of the disputants in a mediation are self-represented, then there will not be any possibility of attorney misconduct

^{40.} Memorandum 2013-47, Exhibit p. 28.

^{41.} Memorandum 2015-45, Exhibit p. 13.

^{42.} See Evid. Code § 1119.

in a professional capacity in the mediation process. Under those circumstances, there would not be a need for anyone to make a disclosure to the disputants about the potential impact of mediation confidentiality on a legal malpractice claim. Thus, a requirement to disclose such information should be subject to an exception where all of the disputants are self-represented.

If one disputant has an attorney while another disputant does not, the situation would be more complicated. The Commission should give careful thought to this situation if it decides to go forward with a mandatory disclosure requirement of some type. Precisely how to handle it may depend on the nature of the disclosure requirement and whether existing mediation confidentiality law would remain in place, or would be subject to a new exception addressing attorney misconduct in a professional capacity in the mediation process.

In What Manner Must the Disclosure Be Made?

In fashioning a statutory disclosure requirement, it would also be necessary to consider the proper *manner* of disclosure. Again, the Commission has received a variety of input on the question, such as:

- Require the Judicial Council to prepare *an informational video* on mediation confidentiality, which disputants would be required to view before the start of a mediation. Each disputant and the attorney for each disputant (if any) would be required to a sign a document attesting that the disputant had viewed the informational video and, if represented by an attorney, had been given an opportunity to discuss it with the attorney before the mediation.⁴³
- Require that certain disclosures about mediation confidentiality be *included in the ADR informational packet* that a court distributes to litigants when referring a case to ADR. Before participating in a mediation, litigants could be required to initial the disclosures and indicate whether they had an opportunity to discuss those matters with counsel.⁴⁴ (*Note:* This type of approach would only work in court-connected mediations.)
- A written statement that "malpractice is protected" could be statutorily "required to be printed in bold face in every confidentiality agreement." ⁴⁵
- "There could be a required paragraph that provides unequivocal wording, notifying all disputing parties that malpractice is

^{43.} See General Approach C-7 (Exhibit pp. 2, 30).

^{44.} See General Approach C-8 (Exhibit pp. 2, 30).

^{45.} Memorandum 2014-6, Exhibit p. 15 (comments of Nancy Yeend) (emphasis added).

- protected, and then if the participants agree to mediate, they could check a box or initial"46
- The Commission could "recommend that every retainer agreement and every mediation confidentiality agreement contain language that any promise made by the attorney to reduce the attorney's fee during mediation is unenforceable, and that such language be in a type size larger than the adjoining type and be initialed by the client." 47
- There should be "a standard list of admonitions written in plain English that attorneys and mediators can give to any client who indicates that he or she is interested in mediation, addressing the downside of participating in mediation as well as the benefits, and ensuring informed consent to the mediation process." 48
- "[P]erhaps the law could require that parties be advised *in writing* that mediation confidentiality will mean that if the party participates in mediation, that party might not be able to pursue a legal malpractice claim against their own attorney in that case." 49 "Whether *a Judicial Council form to be signed by the client* would be appropriate as a way of assuring that the client understands what the client gives up by agreeing to mediation I leave to others to figure out." 50
- "I ... send every attorney in every mediation I do a thoroughgoing *Mediation Information Sheet for Participants*. It contains all of the applicable rules of court, Evidence Code sections and suggests that it be shared with clients and other participants attending the mediation session." The information sheet also contains information about Cassel. "At each mediation I ask all of the participants if they've read the entire information sheet and if they have any questions." ⁵³
- "Attorneys would be required to advise clients in writing when recommending mediation that conversations between them made during the course of the mediation will not be admissible should the client sue the attorney for malpractice committed during the mediation. The document would be required to be signed by both the attorney and client and must be retained by the attorney for a specified period of time." ⁵⁴

^{46.} Memorandum 2014-60, Exhibit p. 1 (comments of Nancy Yeend) (emphasis added).

^{47.} Memorandum 2013-47, Exhibit p. 4 (comments of Sidney Tinberg) (emphasis added).

^{48.} Memorandum 2016-30, Exhibit p. 17 (comments of Lynnette Berg Robe) (emphasis added).

^{49.} First Supplement to Memorandum 2015-54, Exhibit p. 14 (comments of Hon. Keith Clemens, ret.) (emphasis added).

^{50.} *Id.* (emphasis added).

^{51.} First Supplement to Memorandum 2013-47, Exhibit p. 28 (comments of Gary Weiner) (emphasis added).

^{52.} See *id*.

^{53.} *Id.* at Exhibit p. 29 (emphasis added).

^{54.} Memorandum 2015-45, Exhibit p. 11 (comments of Paul Dubow).

• The recommended written notifications "could be presented through the creation of *mandatory Judicial Council forms*." ⁵⁵

Many of these suggestions seem like good ideas. In particular, if the Commission decides to propose a mandatory disclosure requirement of some type, it may be advisable to mandate that the disclosure be conspicuous, in writing, and in plain English, using specific required language. Requiring the development and use of a Judicial Council form might be the best way to accomplish this, because a standard form probably would help prevent disputes over whether a disclosure was sufficiently clear and conspicuous.

It may also be advisable to require the disputants, attorneys, and mediator to sign or initial the standard form, and to require someone to retain it for a specified period of time. That could help minimize disputes over whether a disclosure was given as required.

Finally, a longer, more detailed mandatory disclosure probably would be more likely to generate objections than a concise, to-the-point one. That appears to be a lesson from the strong resistance to an extensive mediation disclosure form unsuccessfully proposed in 2005 by the Civil and Small Claims Advisory Committee of the Judicial Council.⁵⁶ Disputants may also be more likely to read a short disclosure than a long one. Careful, clear, and succinct drafting could thus be critical if the Commission decides to propose a mandatory disclosure of some type.

What are the Consequences of Making the Disclosure or Failing to Make the Disclosure?

If the Commission were to propose a statute requiring that certain information be disclosed to disputants before they mediate, it would be important to specify the consequences of making the disclosure or failing to make the disclosure. In other words, there would need to be some kind of a compliance mechanism, or else the statutory requirement would not mean much.

Only a few commenters have addressed this point. In particular, Paul Dubow says that an attorney should be required to disclose certain information to the client in a document that both the attorney and the client sign. He suggests that

^{55.} Second Supplement to 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client).

^{56.} See See Memorandum 2015-22, pp. 31-34 & Exhibit pp. 28-29.

"[f]ailure to obtain the document would be grounds for a disciplinary proceeding by the State Bar."57

Robert Flack suggests instead "hav[ing] Pre-Mediation Confidentiality Agreements provide a 'Safe Harbor' protecting Confidentiality."58 He urges the Commission to use Business and Professions Code Section 6148 as a model.⁵⁹ In specified circumstances, that code section requires a written fee agreement between an attorney and a client, which must include certain information. However, the section does not apply "[i]f the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required."60

The staff is not altogether sure what Mr. Flack intends. He might be suggesting that the Commission's proposed new exception to mediation confidentiality be rendered inapplicable if the mediation participants execute a pre-mediation agreement that contains specified information.

Regardless of whether that is Mr. Flack's intent, it is a possible enforcement mechanism that the Commission might want to consider. If Mr. Flack has something else in mind, it would be helpful to receive some clarification.

Given Existing Mediation Confidentiality Protections, How Will a Mediation Participant Be Able to Establish Whether the Disclosure Was Made?

Any statutory disclosure requirement would also have to be coordinated with the mediation confidentiality statute. Because that statute makes mediationrelated communications and writings inadmissible in a noncriminal proceeding, it could preclude proof of whether a required disclosure was made.

The answer to this problem would be to make mediation confidentiality inapplicable to the document containing the required disclosure (e.g., a Judicial Council form entitled "Notification for Mediation Participants."). That could be done by amending Evidence Code Section 1120 along the following lines:

- 1120. ... (b) This chapter [on mediation confidentiality] does not limit any of the following:
 - (1) The admissibility of an agreement to mediate a dispute.
- (2) The admissibility of a Notification for Mediation Participants form prepared pursuant to Section xxx.
 - (2) (3) The effect of an agreement not to take a default

^{57.} Memorandum 2015-45, Exhibit p. 11.

^{58.} Exhibit p. 50.

^{59.} See First Supplement to Memorandum 2016-50, Exhibit pp. 14-37.

^{60.} Bus. & Prof. Code § 6148(d)(3) (emphasis added).

A Few Final Thoughts on Disclosure Requirements

A statutory requirement to disclose specified information on mediation confidentiality and its potential effects (or a similar statutory requirement) might help alleviate the concerns that led the Legislature to request this study. As Deborah Blair Porter puts it,

Fundamentally, when everyone has notice of the process, the rules of the game and is on the same page in terms of rights and responsibilities of all the players, the playing field is far closer to level for parties and attorneys alike than it is today. There would be no better boost to confidence in the mediation process as a whole and its continued use and effectiveness as an alternate means of dispute resolution in California could be safeguarded and ensured.⁶¹

The Commission should consider whether it is interested in including some kind of a mandatory disclosure requirement in its tentative recommendation. This could either be an alternative to, or a supplement to, its proposed new exception. If the Commission decides to pursue such an approach, it should also consider what features the disclosure requirement should have.

REVISE THE LAW ON WAIVING MEDIATION CONFIDENTIALITY OR MODIFYING IT BY AGREEMENT

Of the suggested alternatives to the Commission's current approach, the concept of a statutorily mandated disclosure requirement (discussed above) has generated the most interest and the greatest number of comments. Various other reforms have also been proposed, but do not require as much discussion.

In this section of the memorandum, we describe some suggestions to revise the law on (1) waiving mediation confidentiality or (2) modifying mediation confidentiality by agreement of all the mediation participants. We first discuss the suggestions that would involve changing the waiver rules. Then we turn to the suggestions on modifying mediation confidentiality by agreement of all the mediation participants.

Suggestions to Change the Waiver Rules

Under existing law, a waiver of mediation confidentiality generally requires the express agreement of "[a]ll persons who conduct[ed] or otherwise

^{61.} Bus. & Prof. Code § 6148(d)(3).

participate[d] in the mediation"⁶² This Commission's 1996 report on *Mediation Confidentiality* explains that "[a]ll persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."⁶³

In his *Cassel* concurrence, Justice Chin suggested that the Legislature consider the possibility of allowing disclosure of mediation communications when all mediation participants waive confidentiality *except* an attorney accused of malpractice or other misconduct. In other words, the mediation confidentiality statute would not apply "if every participant in the mediation *except the attorney* waives confidentiality."

The staff previously provided the following analysis of that approach:

In theory, this approach would provide a means to address lawyer misconduct, while also allowing all participants except the lawyer to preserve the confidentiality of a mediation when warranted. This is an attractive combination.

In practice, however, the staff suspects that the approach would have little impact. The mediation participants whose waivers would be required would have little to no incentive to provide such waivers, and may have good reasons (not just spiteful ones) for declining to do so. Privacy considerations could well be a legitimate concern. Mediation participants may also want to avoid the burden of providing testimony in the lawyer-client dispute. Mediators might be particularly reluctant to waive mediation confidentiality: Even if Evidence Code Section 703.5 continued to protect them from having to testify, they may fear the act of providing such a waiver and the resulting testimony by others would impinge on their reputations for impartiality and trustworthiness in maintaining confidentiality. In short, the conditions for disclosure under [this approach] might not be met very often. If so, the approach might complicate the law to some extent, without providing offsetting benefits. 65

^{62.} Evid. Code § 1122(a)(1) (emphasis added).

^{63.} Mediation Confidentiality, 26 Cal. L. Revision Comm'n Reports 407, 425 (1996). This report was presented to the Legislature in connection with the bill that became the current mediation confidentiality statute (Evid. Code §§ 1115-1128). It is properly regarded as legislative history. See 2014-2015 Annual Report, 44 Cal. L. Revision Comm'n Reports 1, 16-22 (2014); Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (2005).

^{64.} Cassel, 51 Cal. 4th at 139 (Chin, J., concurring) (emphasis added). This is Option B-1-a in the Compilation of Possible Approaches (see Exhibit p. 22).

^{65.} Memorandum 2016-22, p. 16.

Additionally, the potential prospect of having mediation communications disclosed without their consent might sometimes inhibit attorneys from communicating freely and effectively with their clients at a mediation.⁶⁶

Variants on the above approach would be to:

- Allow mediation *parties* to contractually agree to a *prospective* waiver at the inception of a mediation, which their attorneys could not block.⁶⁷ This waiver would provide that "in the event one party determines, during or after a mediation, that their attorney, or another attorney/representative nonparty participant at the mediation, engaged in actions that compromised their rights or the rights of another party in the mediation and settlement process, the parties will cooperate in any action, which can range from complaints to the State Bar to potential legal action by a party to redress grievances for any such claims, in order to assist the party in redressing their claims."⁶⁸
- Require an attorney representing a client in a mediation to "agree that mediation communications directly between the client and his or her attorney may be disclosed in any action for legal malpractice or in a State Bar disciplinary action, where professional negligence or misconduct forms the basis of the client's allegations against the attorney."

These variants would seem to be subject to many of the same considerations discussed above. To the extent that they seek to limit a waiver to a specific type of case (e.g., a disciplinary proceeding or a legal malpractice case), they might also raise issues relating to the validity of a selective waiver.⁷⁰ In addition, if an approach required an attorney to provide a waiver, there might be questions about whether the waiver was sufficiently voluntary to be effective.⁷¹

^{66.} See, e.g., Memorandum 2015-45, Exhibit p. 26 (Shawn Skillin's comment that attorneys should "be able to represent their clients in mediation and assist them in exploring stategies that can lead to settlement without being concerned that advice appropriate under mediation conditions, can later be used against them in a malpractice action."); Memorandum 2015-46, Exhibit pp. 58 (Paul Glusman's comment that "with the prospect of any dissatisfied litigant suing a lawyer for malpractice over what happened in mediation, it's going to be very hard to get any lawyers to bring cases to mediators if they can no longer be candid."), 205 (Daniel Yamshon's comment that "[c]onfidentiality allows experienced counsel to give sound advice that clients may not want to hear."); First Supplement to Memorandum 2015-54, Exhibit p. 13 (Judge Clemens' prediction that if the Commission's proposed exception is enacted, "lawyers will become much more reluctant to counsel a client to make serious compromises in order to settle that client's divorce.").

^{67.} See First Supplement to Memorandum 2015-36, Exhibit pp. 24-25 (comments of Deborah Blair Porter).

^{68.} *Id.* at Exhibit p. 24.

^{69.} Memorandum 2014-6, Exhibit p. 2 (comments of Ron Kelly, which do not state his personal view)

^{70.} See Memorandum 2015-22, p. 23.

^{71.} See Memorandum 2015-22, pp. 23-24.

If the Commission decides to include any of the above-described waiver approaches in its tentative recommendation, it could present that idea as an alternative to its proposed new mediation confidentiality exception. It might also be possible to present the idea as a *supplement* to the proposed new exception (the staff would need to look at the specifics of this more closely). The Commission should consider whether it has any interest in this type of approach.

Modifying Mediation Confidentiality by Agreement of All Mediation **Participants**

Instead of proposing to change the waiver rules, some suggestions concern the extent to which mediation confidentiality can be adjusted by agreement of all of the mediation participants. For example, Kazuko Artus suggests that "mediation confidentiality can be *made an option* for the participants rather than being imposed on them."72 Similarly, attorney Gregory Herring (writing on behalf of a client) says:

Parties should be presented with an express option to waive confidentiality. ... In this manner, mediation confidentiality would become a real point of consideration rather than a tacit and apparently unavoidable expectation of the ADR "system." It would hurt no one to provide parties the opportunity to make an educated choice; rather, choice would be good.⁷³

Other commenters note that mediation participants can already modify the extent of confidentiality by an express written agreement,⁷⁴ but suggest taking steps to increase awareness of that option. For example, lawyer and mediator Hank Burgoyne states:

Currently, parties can opt out of mediation confidentiality. If you want to take steps to remind parties of that option and the risks of not doing so, feel free.⁷⁵

Similarly, Gary Weiner "hold[s] the view that the parties have always been free to adopt whatever rules regarding confidentiality they choose."⁷⁶ He suggests adding a provision to the Evidence Code to make this point explicit:

^{72.} Second Supplement to Memorandum 2013-39, Exhibit p. 2 (emphasis added). This is General Approach B-4 in the Compilation of Possible Approaches (see Exhibit pp. 1, 24).

^{73.} Second Supplement to Memorandum 2016-50, Exhibit p. 8 (boldface in original).
74. See Evid. Code § 1122(a). Such a modification can also be made by an express oral agreement that is memorialized in a specified manner. See id.; Evid. Code § 1118.

^{75.} Memorandum 2015-46, Exhibit p. 24.

^{76.} First Supplement to Memorandum 2013-47, Exhibit p. 28.

1129. Notwithstanding any other section in this Chapter, nothing prohibits all the participants including the mediator from entering into an express written agreement, signed by all of them, in which they all agree to a different set of provisions regarding the confidentiality of mediation communications in a given mediation.⁷⁷

This type of approach would not conflict with the Commission's proposed new exception to mediation confidentiality. If the Commission decides to include the approach in its tentative recommendation, it could present the idea as an alternative to its proposed new mediation confidentiality exception, as a supplement to its proposed new exception, or both.

Should the Commission decide to pursue the approach, however, a clarification might be in order. Although mediation participants can expressly agree in writing to *decrease* the level of mediation confidentiality, the mediation confidentiality statute may not permit them to *increase* the level of mediation confidentiality.⁷⁸ For example, they probably could not agree to make their mediation communications inadmissible in a criminal case. The Commission may want to takes steps to preserve that limitation.

The Commission should consider whether to include this type of proposal in its tentative recommendation.

SAFEGUARDS AGAINST ATTORNEY MISCONDUCT IN THE MEDIATION PROCESS

A number of suggested approaches focus on *decreasing the risk* of coercion, fraud, duress, malpractice, or other attorney misconduct in the mediation process. These suggestions would create various types of safeguards against such misconduct.

The safeguard suggestions can be grouped into the following categories:

- (1) Suggestions to provide time for reflection before committing to a deal.
- (2) Suggestions to obtain assistance.
- (3) Suggestions to ensure that disputants act knowingly and voluntarily in entering into a settlement.
- (4) Suggestions to ensure that key representations are memorialized in an admissible manner.

^{77.} First Supplement to Memorandum 2013-47, Exhibit p. 29. This is General Approach B-5 in the *Compilation of Possible Approaches* (see Exhibit pp. 1, 24).

^{78.} See Evid. Code § 1122(a). Whether mediation participants can make the terms of a settlement agreement confidential is a separate issue, not addressed here.

Each category of suggestions is discussed in order below.

Suggestions to Provide Time for Reflection Before Committing to a Deal

During this study, the Commission has heard of situations in which a client allegedly was pressured into settling after a long and arduous mediation session. The classic example is *Cassel*, in which the client alleged:

Though he felt increasingly tired, hungry, and ill, his attorneys insisted he remain until the mediation was concluded, and they pressed him to accept the offer, telling him he was "greedy" to insist on more. At one point, [he] left to eat, rest, and consult with his family, but [one of his lawyers] called and told [him] he had to come back. Upon his return, his lawyers continued to harass and coerce him to accept [the] settlement. They threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him they could and would negotiate a side deal They also falsely said they would waive or discount a large portion of his ... legal bill if he accepted [the] offer. They even insisted on accompanying him to the bathroom, where they continued to "hammer" him to settle. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, the attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement.⁷⁹

To help prevent such alleged coercion, the staff raised the possibility of placing a *time limit* on each day's mediation session (such as no more than 8 hours of mediation per day). This was not a staff recommendation, but merely an idea for consideration.⁸⁰ To enforce such a time limit, evidence regarding compliance with it would have to be admissible and subject to disclosure. That might not require any change to the mediation confidentiality statute, because the statute does not protect nonverbal conduct.⁸¹ There could perhaps be an exception to the time limit for exigent circumstances. The staff is not aware of any support for the concept of a daily time limit.

^{79. 51} Cal. 4th at 442-43; see also Memorandum 2015-13, p. 6 & Exhibit p. 49 (Prof. Eric van Ginkel's concern that mediators conduct marathon sessions that continue "deep into the night when there comes a time that the parties are numb and sign just about anything that is put in front of them.").

^{80.} See General Approach D-2 in the Compilation of Possible Approaches (Exhibit p. 33).

^{81.} See, e.g., Radford v. Shehorn, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010).

A possibility that has drawn greater attention⁸² and been enacted into law in some jurisdictions⁸³ would be to establish a *mandatory cooling-off period* after a mediation, during which the parties to a mediated settlement agreement could think over the terms, or get more information, and then rescind the agreement if they change their minds about it.⁸⁴ California already has such a cooling off period for mediation of an earthquake insurance dispute.⁸⁵

The approach also has some scholarly support.⁸⁶ In particular, Prof. Nancy Welsh (Penn State University, Dickinson School of Law) has championed the concept for years, explaining it as follows:

Cooling-off periods have been introduced when it is known that high pressure tactics are being used with some frequency, when there are concerns that the people subjected to such behavior are not truly exercising free choice in entering into agreements, and when it is not possible to regulate effectively the use of high pressure tactics. Under these circumstances, the introduction of a

^{82.} See, e.g., Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly noting possibility of cooling-off period, without stating his personal view); Memorandum 2015-46, Exhibit p. 126 (Scott O'Brien's suggestion to protect against attorney misconduct "by requiring cooling off periods before agreements reached become final and enforceable."); First Supplement to Memorandum 2014-46, Exhibit p. 7 (Judge Susan Finlay's suggestion that "[p]erhaps we should have a statute that contains a clause, as we do in other types of contracts, to the effect that the parties have 5 days to cancel their agreement and if they fail to act within the proscribed time, the the evidence code as it relates to confidentiality applies. This would give the parties time to 'cool off,' seek a first or second opinion, and to think it over."); Memorandum 2015-36, Exhibit p. 14 (comments of Nancy Yeend regarding existing cooling-off requirements in some jurisdictions); Memorandum 2015-54, Exhibit p. 9 (Kenneth Brooks' comment that "Sue Finlay's suggestion of a cooling off period is worth further consideration. Such a period addresses the volitility of our human nature that sometimes benefits from a waiting period."); see also First Supplement to Memorandum 2015-46, Exhibit p. 16 (Suanne Honey's suggestion to "[g]et the proof before you sign on the dotted line, not ... stop confidentiality.").

sign on the dotted line, not ... stop confidentiality.").

83. See, e.g., Ga. Model Ct. Mediation R. XII(d)(2) (party who had no attorney at court-ordered mediation has 3 days after signing of settlement agreement to make objection); Minn. Stat. § 572.35 ("a mediated settlement agreement between a debtor and creditor is not binding until 72 hours after it is signed by the debtor and creditor, during which time either party may withdraw consent to the binding character of the agreement."). See also former Fla. Fam. Law R. Proc. 12.740(f)(1).

^{84.} This is General Approach D-5 in the *Compilation of Possible Approaches* (see Exhibit pp. 2, 34). 85. See Evid. Code § 10089.82(c):

If the parties agree to a settlement agreement, the insured will have three business days to rescind the agreement. Notwithstanding Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, if the insured rescinds the agreement, it may not be admitted in evidence or disclosed unless the insured and all other parties to the agreement expressly agree to its disclosure. If the agreement is not rescinded by the insured, it is binding on the insured and the insurer, and acts as a release of all specific claims for damages known at the time of the mediation presented and agreed upon in the mediation conference. If counsel for the insured is present at the mediation conference and a settlement is agreed upon that is signed by the insured's counsel, the agreement is immediately binding on the insured and may not be rescinded.

^{86.} See Memorandum 2015-35, pp. 41-44.

cooling-off period serves as an effective antidote to high pressure tactics, both because the cooling-off period protect those who have already been subjected to high pressure tactics and because the threat of easy rescission makes it less likely that rational actors will choose to use high pressure tactics In the mediation context, both of these likely effects suggest that the introduction of a cooling-off period represents an effective means to protect the important principle of party self-determination.⁸⁷

Similarly, mediator Cynthia Remmers urges the Commission to consider the cooling-off concept instead of creating a new exception to mediation confidentiality:

[C]hipping away at, or entirely chucking the Evidence Code protections, would only be throwing the baby out with the bath water.

Instead of creating a landslide by beginning the descent down this radical and slippery slope, I urge you to consider a more elegant solution: simply amend the Evidence Code to provide a three to seven day waiting period before any settlement can become effective. In this way, any party that feels concerned about anything that occurred in the mediation will have time to reflect, seek a second legal opinion and/or renege before the deal is final. That is precisely what Congress included in the Older Workers Benefit Protection Act to guard against a pressured waiver of rights, and it works well. The same could be done for mediations of all claims, and still protect the all-important promise of confidential communications.⁸⁸

The cooling-off approach is not without drawbacks, however. For example, Gregory Herring reports that "an arbitrary 'reconsideration' period of some few days" would not have helped his client, because she did not discover the unfairness of her mediated settlement agreement until two weeks after she signed it.⁸⁹ In a similar vein, Prof. Mary Culbert (Loyola Law School Center for Conflict Resolution) initially suggested that instead of creating a mediation confidentiality exception for attorney misconduct, there should be an "automatic 10-day right of rescission" in community-based, DRPA-funded mediation programs. She later withdrew that suggestion (but not her objection to the Commission's proposed new exception) upon realizing that a cooling-off period would not be workable in certain types of community-based, DRPA-funded

89. Second Supplement to Memorandum 2016-50, Exhibit p. 5, n.10.

^{87.} The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 Harv. Negotiation L. Rev. 1, 89 (2001) (emphasis added, footnotes omitted).

^{88.} Memorandum 2015-46, Exhibit p. 137.

mediation programs.⁹⁰ She explained, for instance, that "[g]etting back to the courthouse to put an agreement on the record ten days later would pose a significant burden on the people served by DRPA-Funded Community-Based Mediation Programs, and on the court."⁹¹ A mandatory cooling-off period might also pose complications if there is an impending discovery cut-off date or trial date (though it might be possible to address this in some manner).

Suggestions to Obtain Assistance

Other suggestions focus on ensuring that disputants have people available to help them in the mediation process. For example, mediator Shawn Skillin says: "Let's require the mediators ... to require the clients to consult with independent counsel prior to signing any agreement"⁹² She further suggests that "[n]onattorney mediators should be required to send clients to an actual attorney for all legal documents and paperwork."⁹³

These suggestions to require consultation of an attorney (presumably in addition to any attorney a party might already have) might to some extent help to prevent problematic settlements. They would also increase dispute resolution costs, however, and might sometimes introduce a new source of potential malpractice or other attorney misconduct.

Another approach is used in the UMA: It includes a provision explicitly permitting a mediation party to bring "an attorney or other individual" along to a mediation as a support person.⁹⁴ This is viewed as a means of protecting parties against coercion and power politics in the course of a mediation.⁹⁵

As Nancy Yeend notes, there is a particularly "strong case for self-represented litigants to have support." That would seem to be especially important where the other side has counsel; a self-represented litigant up against a client with counsel might need a support person to avoid feeling overpowered, and might be unusually vulnerable to attorney misconduct.

^{90.} See Memorandum 2016-58, Exhibit pp. 12-13.

^{91.} *Id.* at Exhibit p. 13.

^{92.} Memorandum 2015-45, Exhibit p. 27.

^{93.} Id

^{94.} UMA Section 10 provides: "An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded."

This is General Approach D-4 in the Compilation of Suggested Approaches (see Exhibt pp. 2, 35).

^{95.} See UMA § 10 Comment; see also Memorandum 2015-35, pp. 40-41 & sources cited therein.

^{96.} Memorandum 2015-36, Exhibit p. 14.

It already appears to be widely understood, however, that mediating parties in California can bring along an attorney or other support person. Nonetheless, it might be helpful to make that point explicit, through the enactment of a provision like the one in the UMA. There does not seem to be any potential downside, and it might sometimes be useful to have unequivocal proof of the existence of that right.

Suggestions to Ensure that Disputants Act Knowingly and Voluntarily in Entering Into a Settlement

Another safeguard suggestion comes from mediator Phyllis Pollack. In a blog post she brought to the Commission's attention,⁹⁷ she asked whether a mediator should conduct the equivalent of a *voir dire* before a client signs a mediated settlement agreement. She suggested questions such as the following:

- Have you read the proposed settlement agreement?
- Do you fully and completely understand the terms of the proposed settlement agreement?
- Has your attorney explained the terms of the proposed settlement agreement to you and/or answered to your satisfaction any questions you may have about the proposed settlement agreement?
- Did anyone force, threaten or pressure you into agreeing to this proposed settlement? That is, are you entering it voluntarily and of your own free will?
- Has anyone promised you anything OTHER than what is set forth in the proposed settlement agreement? That is, are there any additional oral or written side agreements or representations?
- Do you understand that you have the right NOT to sign this proposed settlement agreement and instead proceed to trial?
- Do you understand that once you sign this proposed settlement agreement it is binding, admissible and enforceable and you can NOT change your mind?
- Do you understand that because this settlement is occurring in the mediation, nothing said, or written will be admissible in court?
- Are you satisfied with the representation given to you by your attorney here today? Do you understand that because this settlement has occurred as part of a mediation, you are giving up the right to later complain about this representation either to the State Bar of California or by filing a complaint in court?
- Are you under any physical, emotional or mental disability that is preventing you from thinking clearly or impairing your ability to

^{97.} See http://www.pgpmediation.com/informed-consent; Memorandum 2016-30, pp. 15-16.

- understand the terms of the proposed settlement agreement and the questions I have just asked?
- Have you taken any medication or under the influence of any substance (alcohol or drugs) that is preventing you from thinking clearly or impairing your ability to understand the terms of the proposed settlement agreement and the questions I have just asked?
- Are there any questions you wish to ask of me or anyone else?⁹⁸

If the Commission is interested in an approach like this, it will need to give careful thought to how a disputant would prove or disprove that the mediator complied with the voir dire process and what the consequences would be for noncompliance. Of particular note, some of the questions might call for answers that delve into the substance of the mediation. For example, in responding to the question about whether the client fully understands the settlement agreement, the client might raise a substantive question and receive an answer before saying "yes, I fully understand the settlement agreement." It would be necessary to establish clear rules regarding how much of that colloquy could be disclosed if a client later alleged a violation of the voir dire requirement.

One way around that problem might be to use a written voir dire form, consisting only of yes/no checkboxes, instead of having the mediator conduct the voir dire orally. The mediation confidentiality statute could then be made inapplicable to the form (through an amendment of Evidence Code Section 1120, similar to the one shown in the above discussion of "Disclosure Requirements"). Alternatively, the form could be signed by all of the mediation participants, and thus satisfy the admissibility requirements of Evidence Code Section 1122(a).

Suggestions to Ensure that Key Representations are Memorialized in an Admissible Manner

Other suggestions focus more specifically on ensuring that key representations — ones that are critical in convincing a disputant to settle — are memorialized in an admissible manner. That would help protect a disputant from being unable to prove a key representation, and thus being unable to recover for breach of that representation, due to mediation confidentiality.

At the Commission meeting in April 2015, for instance, Commissioner Taras Kihiczak raised the possibility of requiring use of a simple form that says something like:

^{98.} http://www.pgpmediation.com/informed-consent (capitalization in original).

- (1) Party A is relying on the following representations made by Party B during this mediation; and
- (2) Party B agrees to waive mediation confidentiality with respect to whether Party B made those representations.⁹⁹

This form would include similar information about representations made by Party A. Like the voir dire form just discussed, it would have to be potentially admissible in the event of a dispute.

A similar suggestion would focus more specifically on representations relating to attorney's fees. It would have two components (a disclosure requirement and a safeguard suggestion), as follows:

- (1) Require the mediator and/or counsel to inform all mediation participants at the start of each mediation that any adjustment of an attorney-client fee agreement during a mediation must be properly memorialized in a writing, or in an oral recording meeting specified requirements, if it is to be effective; and
- (2) Require completion of a form at the end of each mediation, which would (a) ask each participant to indicate whether there has been any adjustment of an attorney-client fee agreement during the mediation, and (b) remind the participants of the need to properly memorialize any such adjustment.¹⁰⁰

Such an approach might go a long way towards addressing the concerns that some sources have voiced about mediation confidentiality interfering with proof of fee adjustments allegedly made during mediation.¹⁰¹ It would preserve confidentiality, while helping to ensure that any fee adjustment made during a mediation is subject to proof and enforceable.

The Commission should decide whether it is interested in this proposal on memorializing fee adjustments, Commissioner Kihiczak's more general suggestion about memorializing key representations, and/or any of the other

^{99.} This is General Approach C-6 in the *Compilation of Possible Approaches* (see Exhibit pp. 2, 30). 100. This is Option B in Memorandum 2015-45, p. 24. See also General Approach C-12 in the *Compilation of Possible Approaches* (Exhibit pp. 2, 32); Memorandum 2016-30, Exhibit p. 17 (Lynnette Berg Robe's comment that "[i]f, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is an agreement to enhance the attorney's fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys.").

^{101.} See, e.g., First Supplement to Memorandum 2013-47, Exhibit pp. 18-20 (comments of Deborah Blair Porter); Second Supplement to Memorandum 2013-47, Exhibit pp. 8-9 (comments of Jerome Sapiro, Jr.); see also *Porter v. Wyner*, 107 Cal. Rptr. 3d 653 (2010) (alleged fee adjustment in mediation); *Chan v. Lund*, 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122 (2011) (same); Memorandum 2014-58, pp. 23-24 (discussing 7th Circuit case involving possible conflict of interest between attorney and client over receipt of attorney's fees from proposed settlement).

safeguard suggestions discussed above. With the exception of a few of Ms. Pollack's suggested voir dire questions, the safeguard suggestions would not conflict with the Commission's proposed new exception to mediation confidentiality. If the Commission is interested in including any of these ideas in its tentative recommendation, it could propose the idea(s) as an alternative to its proposed new exception, or both. The last choice ("both") would give the reviewing public the fullest opportunity to express its views on the range of available options.

EMPIRICAL STUDY

Another idea in the *Compilation of Possible Approaches* is to propose that the Legislature require an empirical study of specified aspects of mediation confidentiality.¹⁰² In particular, it would be helpful to obtain reliable data bearing on the relationship between mediation confidentiality and attorney malpractice and other misconduct.

As the Commission knows, however, empirical work in this area entails many challenges. For example, the staff believes it would be difficult if not impossible to effectively test the effects of differing mediation confidentiality rules.¹⁰³ Caution is likewise needed in interpreting other types of relevant data.¹⁰⁴

The Commission has repeatedly encouraged specific input on designing an empirical study that would yield valuable results. Ron Kelly made some concrete suggestions about collecting data from the State Bar, which the staff previously analyzed for the Commission. That analysis led to consideration of a different possibility: requiring the State Bar and/or the Judicial Council to collect some data if the Commission's proposed new mediation confidentiality exception were enacted. That possibility is discussed in another memorandum for the upcoming meeting. 107

Thus far, the Commission has not received any other specific suggestions regarding the possibility of proposing an empirical study. **Such suggestions**

^{102.} See General Approach D-1, discussed at Exhibit pp. 2, 33.

^{103.} See Memorandum 2015-5, pp. 4-8.

^{104.} See, e.g., Memorandum 2016-37, p. 5 ("[B]ecause California's mediation confidentiality statute seems to preclude use of mediation communications in a disciplinary proceeding, there may be little incentive for a mediation participant to report an attorney's mediation-related misconduct to the State Bar.").

^{105.} See Memorandum 2016-37.

^{106.} See Minutes (July 2016), p. 4.

^{107.} See Memorandum 2016-58, pp. 36-38.

continue to be welcome, particularly from persons experienced in designing empirical studies.

RON KELLY'S "ALTERNATIVE COMPROMISE PACKAGE"

Ron Kelly recently submitted in writing an "Alternative Compromise Package." ¹⁰⁸ He respectfully requests that the Commission "actively consider" the package at the upcoming meeting "as an alternative to its current proposal." ¹⁰⁹

Elements of the "Alternative Compromise Package"

Mr. Kelly's "Alternative Compromise Package" consists of three elements. The staff has already described two of those elements in this memorandum:

- Require that mediation clients receive an "Information and Caution on Mediation Confidentiality," as shown in the above discussion of "Disclosure Requirements." This suggested disclosure was part of a detailed form drafted by the Administrative Office of the Courts at the request of the Civil and Small Claims Advisory Committee of the Judicial Council. Mr. Kelly regards it as "an excellent summary of current law." He says it would serve to: "Make sure consumers, employees, and other participants understand their most important protection against signing a settlement based on mediation communications. That is if you're settling because you accept an important statement in mediation as true, your best protection is to put it in the settlement agreement and to make the settlement contingent on its factual accuracy." 113
- "If the Commission determines that modification of an attorney/client fee agreement is a significant problem that would not be sufficiently addressed by the notice above, then address the alleged breach of oral contract issue directly, and separately from alleged malpractice." More specifically, Mr. Kelly urges the Commission to pursue the proposal on memorializing fee adjustments that is described above under "Suggestions to Ensure that Key Representations are Memorialized in an Admissible Manner." He cautions, however that attorneys "will likely

^{108.} Exhibit pp. 51-53.

^{109.} Exhibit pp. 51-53.

^{110.} Exhibit p. 51.

^{111.} See Memorandum 2015-22, pp. 31-34 & Exhibit pp. 28-29.

^{112.} See Memorandum 2014-6, Exhibit p. 1.

^{113.} Exhibit p. 51.

^{114.} *Id*.

^{115.} See id.

strongly oppose having to discuss modifying their fee agreements in every mediation when it's not an issue in most"116

The third element in Mr. Kelly's "Alternative Compromise Package" would be to "[r]everse the Supreme Court decision in Cassel by codifying instead the appellate decision in that case."117 This would entail creating a new exception to the mediation confidentiality statute, which would differ from the one that the Commission is currently proposing. Specifically, the attorney and client would be treated as a single mediation participant, and the mediation confidentiality statute would be inapplicable to a private discussion between an attorney and client, at least if the discussion "contain[s] no information of anything said or done or any admission by a party made in the course of the mediation."118 Although this memorandum does not discuss other options that would involve revisiting the Commission's decisions about the contours of its proposed new exception to mediation confidentiality, it may be useful to discuss this particular idea because Mr. Kelly is advancing it as part of his "Alternative Compromise Package," even though his preference (like that of many other commenters) would be not to create any new exception to mediation confidentiality at all. 119

Exception for Private Attorney-Client Communications That Contain No Information of Anything Said or Done by Others in the Mediation

Earlier in this study, the staff discussed the general concept of making mediation confidentiality inapplicable private lawyer-client to communications.¹²⁰ We pointed out that this approach might "facilitate" resolution of a lawyer-client fee dispute" and "help a client hold a lawyer accountable for legal malpractice or professional misconduct that occurs in the context of a mediation."121

We also explained that the approach has a number of disadvantages, "some of which were identified in Cassel as possible reasons why the Legislature took a different approach in the current mediation confidentiality statutes"122 In particular, we said:

^{116.} *Id*.

^{117.} Id.

^{118.} Cassel v. Superior Court, 101 Cal. Rptr. 3d 501, 509 (2009) (depublished opinion). This is Option A-4-a in the *Compilation of Possible Approaches* (see Exhibit pp. 1, 7). 119. See, e.g., Memorandum 2015-46, Exhibit pp. 1-2.

^{120.} See Memorandum 2015-22, pp. 14-15.

^{121.} Id. at 14.

^{122.} Id.

• It may "not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves." Due to this uneven treatment, [this approach] probably would not promote just results and confidence in the justice system to the same extent as [allowing use of all mediation communications relevant to a claim for breach of a duty arising out of the lawyer-client relationship].

. . . .

- Ensuring the confidentiality of lawyer-client communications in the mediation context might "facilitat[e] the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either." A contrary approach would not provide such an opportunity.
- A mediation participant might have trouble recalling whether a comment was made in a private lawyer-client conversation, as opposed to a mediation conversation involving other participants. Resolving disputes over this point might prove difficult and timeconsuming.
- Even if a mediation participant correctly recalls what occurred in a private lawyer-client conversation and what did not, the participant might accidentally refer to what happened in another phase of the mediation when testifying, which could harm the interests of a mediation participant who is not involved in the lawyer-client dispute. 123

With regard to the general concept of making mediation confidentiality inapplicable to private lawyer-client communications, we further noted:

 Private lawyer-client communications "will often disclose what others have said during the mediation." Using a private, mediation-related lawyer-client communication in a later lawyerclient dispute may thus harm the interests of persons who are not involved in that dispute. The possibility of such a disclosure may also chill mediation discussions and impede their effectiveness.

The option that Mr. Kelly is advocating (codifying the appellate decision in Cassel) would address this concern. It would preclude use of private attorney-

^{123.} *Id.* at 14-15 (footnotes omitted).

^{124.} Id. at 15 (footnote omitted).

client communications that contain information of anything said or done by others in the course of the mediation.

At times, that limitation might impede the pursuit of justice by excluding evidence relevant to a claim of attorney misconduct. Mr. Kelly makes clear, however, that he considers this feature important:

The Court of Appeal's decision in Cassel cited the current Evidence Code section 1122(a)(2), and found that its decision was consistent with that section. I recommend the Commission take care to codify the appellate decision in a way that's consistent with 1122(a)(2). This section already provides that <u>a mediation</u> communication may be admitted **IF**:

"(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants [in this case, on behalf of the client, Mr. Cassel], those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation."

Otherwise, you don't solve the central problem that's always been at the heart of this. Suppose I'm an unhappy client later accusing my lawyer of pressuring me to settle in mediation when I shouldn't have, or of pressuring me to refuse a settlement when I should have accepted it. My accused lawyer will naturally want to repeat later in court those conversations <u>during</u> the mediation between client and lawyer which would validate the basis of his recommendation, namely "Here's what we're learning from the other side, and why you really should accept their offer (or reject it)." The content of these is routinely <u>other people's confidential mediation communications</u>.

Codifying the appellate decision on this basis would mean that lawyer and client can repeat things later in court which they said to each other, before or after the mediation, that do not disclose other people's communications. This is also consistent with the request from the California Judges Association. They urged in their March 28, 2016 letter to the Commission that "IF the statutory confidentiality of the private mediation process is going to be invaded then...[disclosure of] [m]ediation statements made by persons other than the client alleging misconduct and the lawyer defending against the claim must be prevented."¹²⁵

^{125.} Exhibit pp. 51-52 (underscoring, capitalization, and boldface in original).

Mr. Kelly's Views on the "Alternative Compromise Package"

Mr. Kelly believes that the above-described "Alternative Compromise Package" would be preferable to the Commission's current proposal. He explains:

The Commission has the opportunity to accomplish its legislative assignment while expanding protections for disputants well beyond what its current proposal would do. The compromise package above would also be much less controversial, because none of these three elements would remove the predictable protection for candid communications in mediation which current law provides. I have reason to believe that if the Commission and the Legislature return the state of the law to what it was before the Supreme Court's reversal of the appellate decision in Cassel, many of the stakeholders who have weighed in with the Commission could live with that.¹²⁶

Mr. Kelly also points out that the Commission "has heard from hundreds of organizations and individuals opposed to the Commission's current proposal," who "argue that the possible benefit in a few cases is small and that the Commission has not seen evidence of a problem occurring frequently enough to warrant the damage they argue will result."127 While cautioning that "[s]ome of these stakeholders may continue to oppose any new exception,"128 he notes:

- "[O]ur current mediation laws were based on difficult public policy choices."129
- Those laws "have been regularly challenged by thoughtful people with good arguments."130
- "[C]ompromise is normally an essential part of the legislative process." 131

He closes by describing another mediation confidentiality reform currently under discussion (relating to financial disclosure documents required by Family Code Sections 2104 and 2105), which he regards as a "workable model" of compromise for the Commission to follow. 132

The Commission should consider whether to include Mr. Kelly's "Alternative Compromise Package" in its tentative recommendation, as a possible alternative to its proposed new exception.

^{126.} Exhibit p. 51 (underscoring in original).

^{127.} Exhibit p. 52.

^{128.} *Id.* 129. *Id.*

^{130.} *Id*.

^{131.} *Id*.

^{132.} See Exhibit p. 53.

PREPARE A REPORT WITH NO RECOMMENDATION OR A RECOMMENDATION TO LEAVE THE LAW AS IS

Finally, the Commission should bear in mind two other possible approaches it could take in this study:

- Prepare a report to the Legislature that (1) addresses the matters that the Legislature directed it to examine in this study (the UMA, laws in other jurisdictions, etc.) and (2) recommends that California retain its existing approach to mediation confidentiality.¹³³
- Prepare a report to the Legislature that (1) addresses the matters
 that the Legislature directed it to examine in this study, (2)
 presents various possible approaches the Legislature could take,
 and (3) makes no recommendation on which approach the
 Legislature should follow (leaving that policy decision solely for
 the Legislature and the Governor to resolve).

The Commission should consider whether to mention and solicit input on either possibility (or both or neither) in its tentative recommendation.

DECISION TO MAKE

After considering the various possible approaches discussed above, the Commission needs to decide which reforms to include in its tentative recommendation:

- Just the proposed new exception to mediation confidentiality discussed in Memorandum 2016-58?
- The proposed new exception and one or more additional reforms described in this memorandum?
- Some other approach?

The staff does not anticipate that including additional reforms would have much impact on how long it will take to complete a draft of the tentative recommendation. But doing so might significantly expedite the process of formulating a final recommendation.

Respectfully submitted,

Barbara Gaal Chief Deputy Counsel

^{133.} This is General Approach B-9 in the Compilation of Possible Approaches (see Exhibit p. 26).

CATEGORY A: CREATE SOME TYPE OF MEDIATION	REATE SOME TYPE OF MEDIATION CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT	
CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY	of Mediation Confidentiality	
MALPRACTICE AND OTHER MISCONDUCT"		
A-1. Allow disclosure for purposes of legal malpractice	B-1. Revise rules re waiver of mediation confidentiality	
action		
A-2. Allow disclosure for purposes of attorney	B-2. Enact UMA in California	
disciplinary proceeding (or make explicit how mediation		
confidentiality applies to such a proceeding)		
A-3. Create exception for both legal malpractice &	B-3. Create general exception to mediation confidentiality	
attorney disciplinary proceeding (e.g., UMA § 6(a)(6))	(In re Teligent)	
A-4. No mediation confidentiality for private attorney-	B-4. Make mediation confidentiality optional	
client communications		
A-5. Let Evid. Code § 958 "trump" mediation	B-5. Make explicit that mediation participants can modify	
confidentiality	extent of mediation confidentiality by agreement	
A-6. Create exception for mediator misconduct (e.g.,	B-6. Clarify meaning of Evid. Code § 1119(c) making	
UMA § 6(a)(5))	mediation communications "confidential"	
A-7. Create exception for monitoring mediators &	B-7. Expressly address using mediation evidence in	
mediation programs	juvenile delinquency case	
A-8. Create exception re validity & enforceability of	B-8. Revise Evid. Code § 1120(a)(3) re mediator's prior	
mediated settlement agreement (e.g., UMA § 6(b)(2))	mediations	
A-9. Use an <i>in camera</i> screening approach in determining	B-9. Retain existing California law on mediation	
admissibility	confidentiality	
A-10. Seal court proceedings, instead of using <i>in camera</i>		
approach		
A-11. Focus on fairness & use judicial tools to		
accommodate competing interests (similar to A-9 & A-		
10)		

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION	CATEGORY D: OTHER IDEAS	
CONFIDENTIALITY OR SIMILAR REFORMS		
C-1. Require disclosure that lawyer is immune for any act	D-1. Empirical study	
in mediation		
C-2. Require disclosure that includes examples of	D-2. Daily time limit	
malpractice		
C-3. Require pre-mediation distribution & completion of	D-3. Modify standards for attorney malpractice claims	
disclosure form	involving mediation communications	
C-4. Require mediator or attorney to make some/all of the	D-4. Enact provision explicitly stating that mediation party	
disclosures already required of a mediator in a court-	is entitled to bring support person along to mediation	
connected mediation		
C-5. Require a disclosure re confidentiality like the one in	D-5. Cooling-off period	
a 2005 proposal by the Civil & Small Claims Advisory		
Committee of the Judicial Council		
C-6. Require use of a simple form that (1) states any	D-6. Develop mediator regulation system for California	
representations being relied upon and (2) waives		
confidentiality re those representations		
C-7. Require Judicial Council to prepare informational	D-7. Require mediation to take place within 30 days of	
video on mediation confidentiality & require mediation	filing of lawsuit	
participants to view it before mediation		
C-8. Require inclusion of disclosures re mediation	D-8. Prohibit person from serving as mediator and referee	
confidentiality in ADR informational packet that court	in same case	
distributes when referring case to ADR		
C-9, C-10, C-11 & C12. Require disclosures re adjusting		
fees in mediation		

One way for the Commission to proceed would be to tentatively recommend some type of exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128; see also Evid. Code § 703.5) to address "attorney malpractice and other misconduct," or aspects thereof.

For some of the input supporting this general concept, see Memorandum 2013-39, Exhibit p. 42 (comments of Nancy Yeend); Second Supplement to Memorandum 2013-47, Exhibit pp. 8-10 (comments of Jerome Sapiro, Jr.); First Supplement to Memorandum 2014-27, Exhibit pp. 1-2 (comments of Howard Fields); *id.* at Exhibit p. 3 (comments of Jack Goetz & Jennifer Kalfsbeek-Goetz); *id.* at Exhibit pp. 24 (comments of Ron Makarem); Memorandum 2014-36, Exhibit pp. 3-4 (comments of Jullie Doyle); Memorandum 2014-36, Exhibit pp. 5-8 (comments of Karen Mak); Memorandum 2014-46, Exhibit p. 3 (further comments of Jack Goetz & Jennifer Kalfsbeek-Goetz); testimony of Bill Chan (6/12/14 CLRC meeting); testimony of Larry Doyle on behalf of CCBA (particularly at 4/9/15 CLRC meeting); testimony of Patrick Evans (6/4/15 CLRC meeting) & written materials submitted by him. See also Memorandum 2015-35 (summarizing scholarly views).

There are many possible ways to draft such an exception. The table below lists various general approaches and, in some instances, a number of different options for implementing them. Because there are numerous variables to consider in drafting this type of exception, which could be combined in different ways, this list is just an attempted compilation of the ideas that people have raised or that have otherwise come to the Commission's attention during its study. It does not purport to include every possible approach.

Approach	Source of Idea
General Approach A-1. Allow disclosure of mediation communications for	Justice Chin in Cassel; see also Third Supplement
purposes of a legal malpractice action. "[I]t may be appropriate to provide	to Memorandum 2013-47, Exhibit p. 3 (article by
that communications during mediation may be used in a malpractice action	Nancy Yeend & Stephen Gizzi) ("A narrow
between an attorney and a client to the extent they are relevant to that action,	exception to the mediation confidentiality statute
but they may not be used by anyone for any other purpose. Such a provision	for attorney malpractice should be created, which
might sufficiently protect other participants in the mediation and also make	only applies to the admissibility of relevant
attorneys accountable for their actions." Cassel v. Superior Court, 51 Cal. 4th	evidence during a subsequent civil or
113, 139 (2011) (Chin, J., concurring).	administrative malpractice proceeding — and in
	no other forum.").

Approach	Source of Idea
Option A-1-a. Enact a provision similar to Fla. Stat. § 44.405(4)(a)(4). This	For input urging CLRC to consider Florida's
would be one way to implement General Approach A-1. The Florida statute	approach, see First Supplement to Memorandum
applies to professional malpractice of any type (not just legal malpractice). It is	2013-39, Exhibit p. 1 (comments of Nancy
also limited to mediation malpractice: There is no confidentiality or privilege	Yeend).
for any mediation communication "[o]ffered to report, prove, or disprove	
professional malpractice occurring <i>during the mediation</i> , solely for the purpose	
of the malpractice proceeding" (Emphasis added.)	
Option A-1-b. Enact a provision similar to Mich. Ct. R. 2.412(D)(11). This	
would be another way to implement General Approach A-1. Under this	
approach, mediation communications may be disclosed when "[t]he mediation	
communication occurs in a case out of which a claim of malpractice arises and	
the disclosure is sought or offered to prove or disprove a claim of malpractice	
against a mediation participant."	
Option A-1-c. Create "a narrow exception to confidentiality that would	Michael Carbone
allow the plaintiff in the legal malpractice case, and the plaintiff only, to	
testify about any advice that the lawyer gave during the mediation. None	For discussion of this idea, see Memorandum
of the other participants should be drawn into that dispute." Memorandum	2014-46, pp. 1-2.
2014-46, Exhibit p. 2 (comments of Michael Carbone) (emphasis in original).	
Option A-1-d. Keep any malpractice exception narrow and carefully	For input along these lines, see First Supplement
tailored (details not specified).	to Memorandum 2013-47, Exhibit p. 7
	(comments of Michael Dickstein); id. at Exhibit
	p. 11 (comments of Bruce Johnsen).

Approach	Source of Idea
General Approach A-2. Allow disclosure of mediation communications for	For input urging CLRC to consider this
purposes of an attorney disciplinary proceeding (or at least make explicit	approach, see First Supplement to
whether and how the mediation confidentiality provisions apply to such a	Memorandum 2013-39, Exhibit p. 1
proceeding).	(comments of Nancy Yeend). See also
	Memorandum 2014-6, Exhibit p. 3
	(comments of Ron Kelly, which do not
	state his personal view).
Option A-2-a. Enact a provision similar to Fla. Stat. § 44.405(4)(a)(6). This would	For input urging CLRC to consider
be one way to implement General Approach A-2. The Florida statute applies to a	Florida's approach, see First Supplement
professional disciplinary proceeding of any type (not just an attorney discipline	to Memorandum 2013-39, Exhibit p. 1
proceeding). It is also limited to mediation misconduct: There is no confidentiality or	(comments of Nancy Yeend).
privilege for any mediation communication "[o]ffered to report, prove, or disprove	
professional misconduct occurring during the mediation, solely for the internal use of	
the body conducting the investigation of the conduct" (Emphasis added.)	
Option A-2-b. Draft a narrow exception for use of a mediation communication in	Rachel Ehrlich raised this general idea at
an attorney discipline proceeding, and put that exception in the Business &	the 6/4/15 CLRC meeting.
Professions Code. This would be another way to implement General Approach A-2.	
Additional A-2 options. Other examples of a mediation confidentiality exception	
allowing disclosure in an attorney discipline proceeding are:	
• Mich. Ct. R. 2.412(D)(10) (mediation communications may be disclosed when	
"[t]he disclosure is included in a report of professional misconduct filed against a	
mediation participant or is sought or offered to prove or disprove misconduct	
allegations in the attorney discipline process.")	
• N.C. Gen. Stat. § 7A-38.1(<i>l</i>)(3) (exception for "disciplinary proceedings before	
the State Bar");	
• S.C. CtAnnexed ADR R. 8(b)(3) (exception for disclosures "required by a	
professional code of ethics").	

APPROACH	Source of Idea
General Approach A-3. Create an exception addressing both malpractice and professional misconduct.	
Option A-3-a. Enact a provision similar to UMA Section 6(a)(6), which provides:	Memorandum 2014-27, Exhibit p. 9
(a) There is no privilege for a mediation communication that is:	(comments of Nancy Yeend); See, e.g., Memorandum 2014-46, Exhibit p. 9 (comments of Eric van
(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party,	Ginkel).
nonparty participant, or representative of a party based on conduct occurring during a mediation	For discussion of UMA Section 6(a)(6), see Memorandum 2014-14, pp. 19-20; Memorandum 2014-24,
(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).	pp. 8-9, 39.
(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure	
may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.	
For other provisions along the same lines, see Maine R. Evid. 514(c)(5); Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3); N.M. Stat. Ann. § 44-7B-5(A)(8); Va. Code Ann. § 8.01-581.22(vii).	
Option A-3-b. Supplement the UMA malpractice exception (shown above) with "checks	
and balances such as in camera hearings and the possibility of imposing sanctions"	
Brian Shannon, Dancing With the One That "Brung Us" — Why the Texas ADR Community Has Declined to Embrace the UMA, 2003 J. Disp. Resol. 197, 208 (2003).	

Approach	SOURCE OF IDEA
General Approach A-4. No mediation confidentiality protection for private attorney-client communications.	This idea was known as "Approach #2" in Memorandum 2015-22.
Option A-4-a. Enact a provision implementing the approach described by the court of appeal in <i>Cassel v. Superior Court</i> , 101 Cal. Rptr. 3d 501, 509 (2009): The attorney and client would be treated as a single mediation participant, and the mediation confidentiality statute would be inapplicable to a private discussion between an attorney and client, at least if the discussion "contain[s] no information of anything said or done or any admission by a party made in the course of the mediation." <i>Cassel v. Superior Court</i> , 101 Cal. Rptr. 3d 501, 509 (2009) (depublished opinion). For discussion of this concept, see Memorandum 2014-43, pp. 12-13 (article by Abraham Gafni); <i>Benesch v. Green</i> , 2009 U.S. Dist. LEXIS 117641 (2009); Memorandum 2015-22, pp. 14-15 (staff analysis).	Depublished court of appeal opinion in <i>Cassel</i> (authored by Justice Jackson, with Justice Zelon concurring). See also Second Supplement to Memorandum 2013-47, Exhibit p. 9 (comments of Jerome Sapiro, Jr.); Memorandum 2014-27, Exhibit p. 9 (comments of Nancy Yeend); First Supplement to Memorandum 2014-27, Exhibit p. 24 (comments of Ron Makerem).
Option A-4-b. Enact a provision implementing the approach described by the court of appeal in <i>Porter v. Wyner</i> , 107 Cal. Rptr. 3d 653, 662 (2010) (formerly also at 183 Cal. App. 4th 949): "The confidentiality aspect which protects and shrouds the mediation process was not meant to subsume a secondary and ancillary set of communications by and between a client and his	Superseded court of appeal opinion in <i>Porter</i> (authored by Presiding Justice Bigelow, with Justice Rubin concurring). For discussion of the <i>Porter</i> litigation, see Memorandum 2015-4, pp. 6-12
own counsel, irrespective of whether such communications took place in the presence of the mediator or not." (Emphasis added.)	Memorandum 2015-4, pp. 6-12.

Approach	SOURCE OF IDEA
Option A-4-c. Enact legislation like AB 2025 (Wagner), as introduced on Feb. 23, 2012. This bill, sponsored by the Conference of California Bar Associations ("CCBA"), proposed to amend Evidence Code Section 1120(b) to say that the chapter on mediation confidentiality does not limit "[t]he admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of <i>communications directly between the client and his or her attorney during mediation</i> if professional negligence or misconduct forms the basis of the client's allegations against the attorney." (Emphasis added.)	For support and opposition letters relating to this version of AB 2025, see Memorandum 2013-39, Exhibit pp. 15-18, 22-42; see also http://www.clrc.ca.gov/pub/Misc-Report/AM-K402-9:21:12.pdf; Second Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Kazuko Artus); First Supplement to Memorandum 2013-47, Exhibit pp. 8-9 (comments of Jeffrey Erdman); Second Supplement to Memorandum 2013-47, Exhibit p. 4 (comments of Paul Dubow & James Madison of CDRC).
Option A-4-d. Create a mediation confidentiality exception for private attorney-client communications, but condition it on the right of either party to object that it would be unfair to consider their private communications without also considering the communications of other parties outside the attorney-client relationship. Consider the merits of that objection <i>in camera</i> . Allow the judge to bar the introduction of the private attorney-client communications if justice requires it.	Staff brainstorming (not a staff recommendation).
Option A-4-e. Same as Option A-4-d, but permit introduction of mediation communications involving mediation communications other than the attorney and client, if those participants waive confidentiality as to the relevant communications, solely for purposes of the proceeding at hand.	Staff brainstorming (not a staff recommendation).

Source of Idea
This idea was known as "Approach #1" in
Memorandum 2015-22.
For discussion of Section 958, see <i>id</i> . at 2-12.
For discussion of this particular idea, see <i>id</i> . at
13-14.

Approach	Source of Idea
General Approach A-6. There should be an exception for mediator	See, e.g., Memorandum 2013-39, Exhibit p.
misconduct.	42 (comments of Nancy Yeend); First
	Supplement to Memorandum 2013-39,
	Exhibit p. 1 (comments of Kazuko Artus);
	First Supplement to Memorandum 2014-27,
	Exhibit p. 3 (comments of Jack Goetz &
	Jennifer Kalfsbeek-Goetz); testimony of
	Patrick Evans (6/4/15 CLRC meeting) &
	written materials submitted by him.
Option A-6-a. Enact a provision similar to UMA Section 6(a)(5), which	See, e.g., Memorandum 2014-46, Exhibit p. 9
provides:	(comments of Eric van Ginkel).
	(
(a) There is no privilege for a mediation communication that is:	For discussion of UMA Section 6(a)(5), see
	Memorandum 2014-14, p. 20; Memorandum
(5) sought or offered to prove or disprove a claim or complaint of professional	2014-24, pp. 9-10, 39. See also Memorandum
misconduct or malpractice filed against a mediator	2015-35, pp. 19-26.
masterium er marphatiste met ugumet u matumer min	2010 00, pp. 15 20.
(d) If a mediation communication is not privileged under subsection (a) or (b),	
only the portion of the communication necessary for the application of the	
exception from nondisclosure may be admitted. Admission of evidence under	
subsection (a) or (b) does not render the evidence, or any other mediation	
communication, discoverable or admissible for any other purpose.	
communication, discoverable of admissible for any other purpose.	

Approach	Source of Idea
Additional A-6 options. For other examples of a mediator misconduct exception, see	The text of these provisions is
• Ala. Civ. Ct. Mediation R. 11(b)(3)(iii)	provided in Memorandum 2014-
• Ariz. Rev. Stat. § 12-2238(A)(2)	35, Exhibit pp. 5-42. Some of
• Colo. Rev. Stat. § 13-22-307(2)(d)	them focus primarily on allowing a
• Del. Super. Ct. Civ. R. 16(b)(4)(d)(ii)	mediator accused of misconduct to
• Ga. ADR R. VII(B)	use mediation evidence in defense.
• Kan. Stat. Ann. §§ 5-512(b)(1), 69-452a(b)(1)	See, e.g., Okla. Stat. tit. 12 §
• Maine R. Evid. 514(c)(4)	1805(F); Or. Rev. Stat. §
• Md. Code, Courts & Judicial Proceedings § 3-1804(b)(2)	36.220(5).
• Mont. Code Ann. § 26-1-813(5)(c)	
• N.M. Stat. Ann.§ 44-7B-5(C)	
• N.C. Gen. Stat. § 7A-38.1(<i>l</i>)(3); N.C. Standards of Prof'l Conduct for Mediators, R. III(F)	
• N.D. Cent. Code § 31-04-11(2)	
• Okla. Stat. tit. 12 § 1805(F)	
• Or. Rev. Stat. § 36.220(5);	
• Va. Code Ann. § 8.01-581.22(ii), (vi).	

Approach	SOURCE OF IDEA
General Approach A-7. Enact an exception for monitoring of mediators and mediation	
programs Option A-7-a. Enact a provision similar to Colo. Rev. Stat. § 13-22-307(5), which provides:	
(5) Nothing in this section shall prevent the gathering of information for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.	
Additional A-7 options. For other mediator or court ADR monitoring provisions, see: • Ga. ADR R. VII(B) ("Collection of information necessary to monitor the quality of [an ADR] program is not considered a breach of confidentiality.") • Mich. Ct. R. 2.412(D)(7) (mediation communications may be disclosed when "[c]ourt personnel reasonably require disclosure to administer and evaluate the mediation program.") • N.M. Stat. Ann. § 44-7B-5(D)(2) ("Nothing in the Mediation Procedures Act shall prevent the gathering of information for research or educational purposes or for the purpose of evaluating or monitoring the performance of a mediator; provided that the mediation parties or the specific circumstances of the dispute of the mediation parties are not identified or identifiable"). • S.C. CtAnnexed ADR R. 8(b)(3) (confidentiality rule does not prohibit "[t]he mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program"). • See also Miss. Ct. Annexed Mediation R. XV(E) Comment.	

Approach	SOURCE OF IDEA
General Approach A-8. Enact an exception relating to the validity and	
enforceability of a mediated settlement agreement.	
Option A-8-a. Enact a provision similar to UMA Section 6(b)(2), which	For discussion of UMA Section 6(b)(2), see
provides:	Memorandum 2014-14, pp. 20-22;
	Memorandum 2014-24, pp. 10-13, 39.
(b) There is no privilege if a court, administrative agency, or arbitrator finds,	
after a hearing in camera, that the party seeking discovery or the proponent of the	
evidence has shown that the evidence is not otherwise available, that there is a need	
for the evidence that substantially outweighs the interest in protecting	
confidentiality, and that the mediation communication is sought or offered in:	
(2) except as otherwise provided in subsection (c), a proceeding to prove a claim	
to rescind or reform or a defense to avoid liability on a contract arising out of the	
mediation.	
(c) A mediator may not be compelled to provide evidence of a mediation	
communication referred to in subsection (a)(6) or (b)(2).	
(d) If a mediation communication is not privileged under subsection (b), only	
the portion of the communication necessary for the application of the exception	
from nondisclosure may be admitted. Admission of evidence under subsection	
(b) does not render the evidence, or any other mediation communication,	
discoverable or admissible for any other purpose.	
Option A-8-b. Enact a provision similar to UMA Section 6(b)(2), but without	See, e.g., Memorandum 2014-46, Exhibit p.
the rule prohibiting mediator testimony.	9 (comments of Eric van Ginkel). For
	discussion of special considerations re
	mediator testimony, see, e.g, Memorandum
	2014-58, pp. 17-18. See also <i>In re</i>
	Anonymous, 283 F.3d 627 (4th Cir. 2001)
	(higher standard for mediator testimony).

Approach	Source of Idea
Option A-8-c. Enact a provision similar to Fla. Stat. § 44.405(4)(a)(5), which	For discussion of Florida law, see
says there is no protection for a mediation communication that is "[o]ffered for the	Memorandum 2014-35, pp. 4-25.
limited purpose of establishing or refuting legally recognized grounds for voiding	
or reforming a settlement agreement reached during a mediation." Such evidence	
may be used solely for that purpose (see Fla. Stat. § 44.405(4)(b)).	
Additional A-8 options. For other examples of provisions creating an exception	
for a challenge to a mediated settlement agreement, see:	
• La. Rev. Stat. § 9:4112(b)(1)(c)	
• Maine R. Evid. 408(b)	
• Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3)	
• Mich. Ct. R. 2.412(D)(12)	
• Minn. Stat. §§ 572.36, 595.02(1)(m)	
• N.C. Gen. Stat. § 7A-38.1(<i>l</i>)(2)	
• N.D. Cent. Code § 31-04-11	
• Or. Rev. Stat. § 36.220(4)	
• Pa. Cons. Stat. § 5949(b)(4)	
• Va. Code Ann. § 8.01-581.22(viii), 8.01-581.26.	

Approach	Source of Idea
General Approach A-9. Use an <i>in camera</i> screening approach, in which a judge or other decision-maker reviews proffered mediation evidence in chambers to determine its admissibility pursuant to a statutory standard.	See, e.g., Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly, which do not state his personal view). See also Memorandum 2014-24, pp. 21-23 (discussing practicalities of UMA's <i>in camera</i> approach for certain exceptions); Memorandum 2014-43, pp. 9-10 (discussing <i>in camera</i> issue raised in Pennsylvania case); Memorandum 2015-13, p. 2 & Exhibit pp. 1-2 (paper by Amelia Green).
	See also Memorandum 2015-35, pp. 34-36 (summarizing scholarly views on use of <i>in camera</i> hearings).
Option A-9-a. Enact an attorney misconduct or professional misconduct exception modeled on the <i>in camera</i> approach of UMA Section 6(b). To give one possible example:	
Section 1119 does not apply if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered: (a) To prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.	

Approach	SOURCE OF IDEA
Option A-9-b. Enact an exception modeled on the <i>in camera</i> approach of Texas Civ. & Rem. Code § 154.073(e):	
(e) If this section [on mediation confidentiality] conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine in camera whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.	
Closely similar provisions include Ark. Code Ann. § 16-7-206(c); La. Rev. Stat. § 9:4112(D); Miss. Ct. Annexed Mediation R. VII(D).	
In <i>Avary v. Bank of America, N.A.,</i> 72 S.W.3d 770 (Tex. Ct. App. 2002), the Texas Court of Appeals for the Fifth District construed Section 154.073(e) to permit the introduction of mediation evidence for purposes of proving an "independent tort" during mediation that encompasses a duty to disclose, but only if the trial judge conducts an <i>in camera</i> hearing and determines that the "facts, circumstances, and context" warrant disclosure. The "independent tort" at stake involved professional misconduct (breach of a bank's fiduciary duty as executor of an estate). But the Court of Appeals did not frame its holding in terms of professional misconduct; it spoke of tortious conduct generally. For further discussion of <i>Avary</i> and related cases, see Memorandum 2014-44, pp. 6-15, 24-25; see also <i>Wimsatt v. Superior Court,</i> 152 Cal. App. 4th 137, 163, 61 Cal. Rptr. 3d 200 (2007) (praising "independent tort" approach used in Texas and criticizing more strict approach used in California).	

APPROACH Option A-9-c. Codify the *in camera* approach that Magistrate Judge Brazil described in *Olam v. Congress Mortgage Co*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999):

"[A California trial judge should] conduct a two-stage balancing analysis. The goal of the first stage balancing is to determine whether to compel the mediator to appear at an *in camera* proceeding to determine precisely what her testimony would be. In this first stage, the judge considers all the circumstances and weighs all the competing rights and interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear at an *in camera* proceeding to disclose only to the court and counsel, out of public view, what she would say the parties said during the mediation. At this juncture the goal is to determine whether the harm that would be done to the values that underlie the mediation privileges simply by ordering the mediator to participate in the *in camera* proceedings can be justified — by the prospect that her testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude.

The trial judge reaches the second stage of balancing analysis only if the product of the first stage is a decision to order the mediator to detail, *in camera*, what her testimony would be. A court that orders the *in camera* disclosure gains precise and reliable knowledge of what the mediator's testimony would be — and only with that knowledge is the court positioned to launch its second balancing analysis. In this second stage the court is to weigh and comparatively assess (1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator's testimony was not accessible in the specific proceedings in question, and (4) how much the testimony would contribute toward protecting those rights or advancing those interests — an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value."

In *Olam*, Magistrate Judge Brazil said this approach was based on *Rinaker v. Superior Court*, 62 Cal.

SOURCE OF IDEA

App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

For further discussion of *Olam*, see Memorandum 2014-45.

For discussion of *Rinaker*, see Memorandum 2015-4, pp. 32-34.

Approach	Source of Idea
Option A-9-d. Enact an <i>in camera</i> approach similar to Section 574(a)(4)(C) of the	Ron Kelly supports this concept "IF
Federal Administrative Dispute Resolution Act of 1996:	the Commission determines that
	weakening our current mediation
A mediation communication made inadmissible or protected from disclosure by	confidentiality protections is
provisions of this chapter shall not become admissible or subject to disclosure under this	absolutely necessary, and
section unless a court first determines in an in camera hearing that this is necessary to	recommends an in camera hearing
prevent harm to the public health or safety of sufficient magnitude in the particular case to	process." Third Supplement to
outweigh the integrity of dispute resolution proceedings in general by reducing the	Memorandum 2014-60, Exhibit p. 3.
confidence of parties in future cases that their communications will remain confidential.	
Additional A-9 options. For other examples of <i>in camera</i> approaches, see:	
• Ala. Civ. Ct. Mediation R. 11(b)(3) & Comment. The rule itself does not say anything	
about an <i>in camera</i> hearing, but the Comment says: "Any review of mediation proceedings	
as allowed under Rule 11(b)(3) should be conducted in an <i>in camera</i> hearing or by an <i>in</i>	
camera inspection."	
• Mich. Ct. R. 2.412(D)(12), which says that mediation communications may be disclosed	
when "[t]he disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a	
document signed by the mediation parties or acknowledged by the parties on an audio or	
video recording that arose out of mediation, if the court finds, after an in camera hearing,	
that the party seeking discovery or the proponent of the evidence has shown	
(a) that the evidence is not otherwise available, and	
(b) that the need for the evidence substantially outweighs the interest in protecting	
confidentiality.	
(continued on next page)	

Approach	SOURCE OF IDEA
Additional A-9 options (cont'd):	
• N.M. Stat. Ann. § 44-7B-5(A)(8), which says: "Mediation communications may be disclosed if a court, after hearing in camera and for good cause shown, orders disclosure of evidence that is sought to be offered and is not otherwise available in an action on an agreement arising out of a mediation evidenced by a record. Nothing in this subsection shall require disclosure by a mediator of any matter related to mediation communications."	
• Wis. Stat. § 904.085(4)(e): "In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally."	
General Approach A-10. Seal court proceedings instead of using an <i>in camera</i> screening approach. This concept is similar to General Approach A-10, just a different procedural mechanism to achieve the same effect.	Magistrate Judge Brazil followed this approach in <i>Olam v. Congress Mortgage Co</i> , 68 F. Supp. 2d 1110 (N.D. Cal. 1999). For further discussion of <i>Olam</i> , see Memorandum 2014-45.
General Approach A-11. Focus on ensuring fairness and using judicial tools to accommodate the competing interests. This concept is similar to General Approach A-9 and General Approach A-10. It would embrace two key principles: (1) the importance of providing a level playing field with regard to use of mediation communications in a lawyer-client dispute (giving both lawyer and client an equal opportunity to present relevant mediation communications), and (2) using judicial tools such as <i>in camera</i> hearings or sealing orders to creatively accommodate the competing interests to the greatest extent possible (providing a certain amount of statutory guidance, while affording some degree of flexibility to the trial judge to tailor the approach to the circumstances of a particular case). The approach could be fleshed out in many different ways.	This idea was known as "Approach #4" in Memorandum 2015-22. For staff analysis of the idea, see <i>id.</i> at 16-17.

Approach	Source of Idea
General Approach A-12. Distinguish between (1) cases where the underlying dispute has settled and (2) cases where the underlying dispute has not settled and disclosure of mediation communications could still seriously affect the outcome.	See Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly, which do not state his personal view); Memorandum 2014-46, Exhibit pp. 4-9 (comments of Eric van Ginkel); Sarah Cole, Secrecy & Transparency in Dispute Resolution, Protecting Confidentiality in Mediation: A Promise Unfulfilled?, 54 Kan. L. Rev. 1419, 1450-51 (2005). See also Memorandum 2015-13, pp. 6-7 & Exhibit p. 49 (comments of Nancy Yeend) (suggesting somewhat similar distinction).
General Approach A-13. Enact legislation implementing an approach similar	(
to the one recently proposed in Indiana. This concept would be somewhat	
similar to General Approach A-12. As explained in Memorandum 2014-59, pp. 8-10, the Indiana proposal distinguishes between (1) use of mediation evidence in the mediated dispute, which would generally be prohibited, and (2) use of mediation evidence in a collateral matter, which would be permissible in certain circumstances. An attorney discipline proceeding is a collateral matter for purposes of this approach. The proposal does not clearly specify whether a legal malpractice proceeding is a collateral matter for purposes of the approach.	

Approach	Source of Idea
General Approach A-14. There should be a mediation confidentiality	See, e.g., Memorandum 2015-24, pp. 1-2 &
exception for mediation evidence that is relevant to collection of an attorney's	Exhibit p. 1 (comments of Perry Smith re
fee or a mediator's fee (enabling both attorney and client to introduce such	impact of mediation confidentiality on
evidence).	particular type of fee agreement).
For example, Michigan permits disclosure of mediation communications when "[t]he disclosure is necessary for a court to resolve disputes about the mediator's fee." Mich. Ct. R. 2.412(D)(4).	
Similarly, a bill introduced in New York in 2002 (SB 3495) included an exception for "evidence necessary to prove or defend against a claim for fees brought by the mediator for services rendered in the proceeding."	
General Approach A-15. Include some kind of corroboration requirement in	The staff raised this idea, without making a
an exception addressing attorney accountability.	recommendation. See Memorandum 2015-13,
	p. 3. For analysis of the idea, see <i>id</i> . at Exhibit
	pp. 21-44 (paper by Jordan Rice).

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

Category A (above) consists of proposals to create some type of mediation confidentiality exception that addresses "attorney malpractice and other misconduct." In addition to the ideas in Category A, the Commission has also received, or otherwise learned of, various other ideas about revising the existing mediation confidentiality statutes, which are collected here in Category B.

Approach	Source of Idea
General Approach B-1. Revise the rules relating to waiver of the mediation	
confidentiality protections (Evid. Code §§ 1115-1128; see also Evid. Code § 703.5)	
Option B-1-a. Allow disclosure of mediation communications when all mediation	Justice Chin in Cassel.
participants waive confidentiality except an attorney accused of malpractice or other	
misconduct. In other words, the mediation confidentiality statute would not apply "if every	This idea was known as "Approach #3" in
participant in the mediation except the attorney waives confidentiality." Cassel v. Superior	Memorandum 2015-22. For staff analysis
Court, 51 Cal. 4th 113, 139 (2011) (Chin, J., concurring) (emphasis in original).	of the idea, see <i>id.</i> at 15-16; see also <i>id.</i> at pp. 2-12 (discussing Evid. Code § 958).
Option B-1-b. Add the following provision to the Evidence Code:	See Memorandum 2014-6, Exhibit pp. 1-2 (comments of Ron Kelly, which do not
Section 1130. Attendance Sheet and Agreement to Disclosure.	state his personal view)
(a) An attorney representing a client for purposes of a mediation shall request that all	
participants in the mediation complete an attendance sheet stating their names, mailing	For staff analysis of the same general idea,
addresses, and telephone numbers, shall retain the attendance sheet for at least two years, and	see Memorandum 2015-22, pp. 18-24.
shall provide it to the client on request.	
(b) An attorney representing a client for purposes of a mediation shall agree that mediation	
communications directly between the client and his or her attorney may be disclosed in any	
action for legal malpractice or in a State Bar disciplinary action, where professional negligence	
or misconduct forms the basis of the client's allegations against the attorney.	
Option B-1-c. The Commission should "consider contractual provisions which seek to	First Supplement to Memorandum 2013-
waive confidentiality, i.e., specifically those waivers which may be used in the context of	47, Exhibit p. 18 (comments of Deborah
disputes involving public agencies where transparency and accountability are at issue."	Blair Porter).

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

Approach	Source of Idea
General Approach B-2. Enact the Uniform Mediation Act in California.	See, e.g., Memorandum 2014-6, Exhibit pp. 17-29 (article by Richard Zitrin); <i>id.</i> at Exhibit p. 16 (urging that reform "be retroactive as to issues between a client and his/her/its own lawyer"); Memorandum 2014-14, Exhibit pp. 96-98 (article by Jeff Kichaven); <i>id.</i> at 109-11 (article by J. Daniel Sharp). See also Memorandum 2014-36, Exhibit pp. 5-8 (comments of Karen Mak); Memorandum 2014-46, Exhibit pp. 4-9 (comments of Eric van Ginkel, urging enactment of UMA, with a few revisions). The UMA has been endorsed by the American Arbitration Ass'n, the Judicial Arbitration & Mediation Service ("JAMS"), the CPR Institute for Dispute Resolution, and the Nat'l Arbitration Forum. For discussion of the UMA, see Memorandum 2014-14; Memorandum 2014-24. States where the UMA got serious consideration but was not enacted include Connecticut, Maine, Massachusetts, Minnesota, New Hampshire, New York, Pennsylvania, Texas, and perhaps others.
	For scholarly views on the UMA, see Memorandum 2015-35.

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

Approach	Source of Idea
General Approach B-3. Create a general exception to mediation confidentiality, like the one that the Second Circuit used in <i>In re Teligent</i> , 640 F.3d 53, 58 (2d Cir. 2011):	For discussion of this approach, see Memorandum 2014-58, pp. 22-23.
A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.	
General Approach B-4. Make mediation confidentiality optional for mediation participants, rather than having it imposed on them by statute.	See Second Supplement to Memorandum 2013-39, Exhibit p.2 (comments of Kazuko Artus).
General Approach B-5. Make explicit that mediation participants can modify the extent of mediation confidentiality by agreement. This suggestion could be implemented by adding the following provision to the Evidence Code:	See First Supplement to Memorandum 2013-47, Exhibit p. 29 (comments of Gary Wiener).
1129. Notwithstanding any other section in this Chapter, nothing prohibits all the participants including the mediator from entering into an express written agreement, signed by all of them, in which they agree to a different set of provisions regarding the confidentiality of mediation communications in a given mediation.	
General Approach B-6. Clarify the meaning of Evidence Code Section 1119(c), which provides:	See generally Memorandum 2014-27, Exhibit p. 9 (Comments of Nancy Yeend).
(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.	

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

Approach	Source of Idea
General Approach B-7. Revise the mediation confidentiality statutes to	Staff brainstorming based on <i>Rinaker v. Superior</i>
expressly address the use of mediation communications in a juvenile	Court, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464
delinquency case.	(1998) (just an idea, not a staff recommendation).
General Approach B-8. Revise Evidence Code Section 1120(a)(3), which	Staff brainstorming in Memorandum 2014-58 p. 27
says that California's mediation confidentiality provisions do not limit	(just an idea, not a staff recommendation); see also
"[d]isclosure of the mere fact that a mediator has served, is serving, will	Memorandum 2015-4, pp. 20-22 (discussing <i>Furia v</i> .
serve, or was contacted about serving as a mediator in a dispute." This	Helm, 111 Cal. App. 4th 945, 4 Cal. Rptr. 3d 357
provision might not be framed broadly enough to cover all of the conflict-of-	(2003).
interest information a prospective mediator must disclose.	
	At the 4/915 CLRC meeting, John Warnlof also
	suggested consideration of the conflict-of-interest
	disclosure standard used in CEATS, Inc. v. Continental
	Airlines, Inc., 755 F.3d 1356 (Fed. Cir. 2014), as well
	as other possible models, including UMA Section 9.

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

APPROACH	SOURCE OF IDEA
APPROACH General Approach B-9. Retain existing California law on mediation confidentiality (Evid. Code §§ 1115-1128; see also Evid. Code § 703.5).	See, e.g., First Supplement to Memorandum 2013-47, Exhibit p. 1 (comments of Joshua Abrams); <i>id.</i> at Exhibit pp. 2-3 (comments of Ass'n for Dispute Resolution of Northern California); <i>id.</i> at Exhibit p. 10 (comments of Armand Estrada); <i>id.</i> at Exhibit p. 11 (comments of Bruce Johnson); <i>id.</i> at Exhibit pp. 14-16 (comments of Terry Norbury); <i>id.</i> at 26 (comments of Darlene Weide); Second Supplement to Memorandum 2013-47, Exhibit p. 1 (comments of Margaret Anderson); <i>id.</i> at Exhibit p. 2 (comments of Contra Costa
	County Bar Ass'n); Third Supplement to Memorandum 2013-47, Exhibit pp. 1-2 (comments of Paul Glusman); Memorandum 2014-27, Exhibit p. 1 (comments of Bonnie Fong); <i>id.</i> at Exhibit p. 3 (comments of Thomas Lambie); <i>id.</i> at Exhibit p. 4 (comments of Jim O'Brien; comments of Barbara Peyton); <i>id.</i> at Exhibit p. 5 (comments of Jane Stallman); <i>id.</i> at Exhibit p. 6 (comments of Patricia Tweedy); First Supplement to Memorandum 2014-27, Exhibit p. 25 (comments of Nancy Milton); Memorandum 2014-36, Exhibit pp. 1-2 (comments of Doug deVries); Second Supplement to Memorandum 2014-60 (comments of Hon. Paul Aiello (ret.)); Memorandum 2015-13, Exhibit pp. 46-47 (comments of Stephen Schrey); <i>id.</i> at Exhibit p. 50 (comments of Spencer Young).
	See generally Second Supplement to Memorandum 2013-47, Exhibit pp. 3-7 (comments of James Madison & Paul Dubow re likely views of CDRC membership).

Another possibility would be to statutorily require some type of disclosures to mediation participants regarding mediation or mediation confidentiality, particularly the treatment of evidence relating to alleged mediation misconduct. The Commission could propose this type of reform instead of, or in addition to, modifying the extent of mediation confidentiality. Some possible disclosure requirements and similar reforms are listed below (Category C).

If the Commission decides to propose a statute requiring such disclosures, it might be appropriate to revise the confidentiality provisions to enable mediation participants to show whether the required disclosures were made. It might also be advisable to require that certain disclosures be in writing and each mediation participant sign the document containing the disclosures.

For some of the input supporting this general concept, see, e.g., First Supplement to Memorandum 2013-39, Exhibit p. 2 (comments of Nancy Yeend); First Supplement to Memorandum 2013-47, Exhibit pp. 2-3 (comments of Ass'n for Dispute Resolution of Northern California); Third Supplement to Memorandum 2013-47, Exhibit pp. 3-4 (article by Nancy Yeend & Stephen Gizzi); Memorandum 2014-60, Exhibit p. 1 (comments of Nancy Yeend); First Supplement to Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason). See also Memorandum 2014-43, pp. 13-14 (describing points raised in article by Pa. lawyer Abraham Gafni); Memorandum 2015-24, pp. 3-4 & Exhibit p. 3 (comments of Nancy Yeend); Memorandum 2015-35, pp. 36-39 (summarizing scholarly views on informing mediation participants about extent of mediation confidentiality); testimony of Larry Doyle on behalf of CCBA (4/9/15 CLRC meeting); *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 163, 61 Cal. Rptr. 3d 200 (2007).

Approach	Source of Idea
General Approach C-1. "[L]awyers should be obliged to disclose to their	Second Supplement to Memorandum 2013-
clients that, if the client agrees to mediate, then the lawyer is immune	47, Exhibit p. 9 (comments of Jerome Sapiro,
regarding anything the lawyer does or says during or related to mediation."	Jr.).
	Nancy Yeend made a similar suggestion. See
	Memorandum 2014-6, Exhibit p. 15: "[I]f the
	confidentiality statute remains unchanged the
	Commission could always recommend an
	explicit requirement mandating disclosure of
	the fact that malpractice is protected, and a
	written statement could be required to be
	printed in bold face in every confidentiality
	agreement."

APPROACH	Source of Idea
General Approach C-2. The required disclosure "should include examples of	First Supplement to Memorandum 2014-60,
malpractice the average person can understand and recognize if it is	Exhibit p. 1 (comments of Edward Mason).
occurring in the process."	
General Approach C-3. Statutorily require pre-mediation distribution and	Testimony of John Warnlof (4/9/15 CLRC
completion of a disclosure form. Under this approach, attorneys would be	meeting).
required to distribute and explain a disclosure form to their clients <i>before</i> the first	
mediation session, instead of having the mediator present the form at the start of	
the first mediation session. A possible disclosure form, used by John Warnlof in	
his mediations, is attached as Exhibit p. 3.	
General Approach C-4. Statutorily require a mediator (or possibly an	Staff brainstorming (just an idea, not a staff
attorney representing a party in a mediation) to make all or some of the	recommendation).
disclosures that court rules currently require a mediator in a court-connected	
mediation to make. Those disclosures are:	A 2005 proposal by the Civil & Small Claims
	Advisory Committee would have required a
• The requirement to disclose matters that could raise a question about a	mediator to present a form containing such
mediator's ability to conduct the mediation impartially.	information and other material at the start of
• The requirement to provide a general explanation of the mediation	each mediation (proposed form ADR-108).
confidentiality rules at or before the first mediation session.	For convenient reference, proposed form
• The requirement to explain the mediator's practice regarding confidentiality for	ADR-108 is attached as Exhibit pp. 1-2. For
separate caucuses held during a mediation.	discussion of the 2005 proposal, see
• The requirement to inform mediation parties, at or before the first mediation	Memorandum 2015-22, pp. 31-34.
session, that any resolution of the dispute in mediation requires <i>voluntary</i>	
agreement of the parties.	
• The requirement to provide all mediation participants with a general	
explanation of the nature of the mediation process, the procedures to be used, and	
the roles of the mediator, the parties, and the other participants.	
• The requirement that the mediator inform all participants, at or before the first	
mediation session, that the mediator will not represent any participant as a lawyer	
or perform any professional services in any capacity other than as an impartial	
mediator.	

Approach	SOURCE OF
	Idea
General Approach C-5. Disclosure re confidentiality from 2005 proposal. Add section to Evidence Code:	Memorandum
Section 1129. Required Notice. An attorney representing a client for purposes of a mediation shall provide	2014-6,
the following notice to her or his client prior to the mediation.	Exhibit pp. 1-
INFORMATION AND CAUTION ON MEDIATION CONFIDENTIALITY	2 (comments
1. Summary of California Mediation Confidentiality Law. To promote communication in mediation,	of Ron Kelly,
California Evidence Code sections 703.5 and 1115-1128 establish the confidentiality and limit the disclosure,	without
admissibility, and court's consideration of communications, writings, and conduct in connection with a mediation.	stating
In general, they provide:	personal
a. All communications, negotiations, or settlement offers in the course of a mediation must remain confidential;	view);
b. Statements made and writings prepared in connection with a mediation are not admissible or subject to	testimony of
discovery or compelled disclosure in noncriminal proceedings;	Ron Kelly at
c. A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be	4/9/15 &
submitted to or considered by a court or another adjudicative body; and	6/4/15 CLRC
d. A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring	meetings in
at or in connection with a mediation.	support of
2. CAUTION. This means you cannot rely on statements made in mediation. They can't be admitted in	concept.
evidence in any later non-criminal proceeding UNLESS they are part of a written settlement agreement AND your	
settlement agreement is signed by all necessary parties and states that you want it to be an enforceable agreement	
(or words to that effect — see California Evidence Code section 1123).	
3. Examples. You cannot rely on statements from the other side such as	
"You need to accept much less money than you believe is fair because I only	
have the following assets and would declare bankruptcy if we went to court"	
UNLESS you include this list of assets in your settlement agreement and make the accuracy of the list a condition	
of your settlement.	
You cannot rely on statements from your own lawyer such as	
"If you accept the proposed settlement, I (your lawyer) will reduce my legal	
fees by this amount"	
UNLESS you ensure this is included in your settlement agreement.	

Approach	SOURCE OF IDEA
General Approach C-6. Require use of a simple form that states something	Commissioner Taras Kihiczak raised this idea
like: (1) Party A is relying on the following representations made by Party B	at the 4/9/15 CLRC meeting.
during this mediation, and (2) Party B agrees to waive confidentiality with	
respect to those representations.	
General Approach C-7. Enact legislation that would require the Judicial	Staff brainstorming based on a suggestion
Council to prepare an informational video on mediation confidentiality,	made by Commissioner Crystal Miller-
which mediation participants would be required to view before the start of a	O'Brien at the 4/9/15 CLRC meeting (just an
mediation. The legislation could further require each participant and the attorney	idea, not a staff recommendation).
for each participant (if any) to sign a document attesting that the participant	
viewed the informational video and, if represented by an attorney, had an	
opportunity to discuss it with the attorney before the mediation.	
General Approach C-8. Enact legislation requiring that certain disclosures	John Warnlof raised this general idea at the
about mediation confidentiality be included in the ADR informational packet	6/4/15 CLRC meeting.
that a court distributes to litigants when referring a case to ADR. Before	
participating in a mediation, litigants could be required to initial the disclosures	
and indicate whether they had an opportunity to discuss those matters with	
counsel.	

APPROACH	SOURCE OF IDEA
General Approach C-9. Disclosures with regard to adjusting fees in a mediation. Sometimes a client alleges that an attorney, mediator, or other professional orally promised to reduce his or her fee to help achieve a settlement, but the promise was not reduced to writing and the professional reneged.	Several sources have raised specific concerns about adjustment of fees during a mediation. See, e.g., First Supplement to Memorandum 2013-47, Exhibit pp. 18-20 (comments of Deborah Blair Porter); Second Supplement to Memorandum 2013-47, Exhibit pp. 8-9 (comments of Jerome Sapiro, Jr.). See also <i>Porter v. Wyner</i> , 107 Cal. Rptr. 3d 653 (2010) (alleged fee adjustment in mediation); <i>Chan v. Lund</i> , 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122 (2011) (same); Memorandum 2014-58, pp. 23-24 (discussing 7th Circuit case involving possible conflict of interest between attorney and client over receipt of attorney's fees from proposed settlement).
General Approach C-10. CLRC could "recommend that every retainer agreement and every mediation confidentiality agreement contain language that any promise made by the attorney to reduce the attorney's fee during mediation is unenforceable, and that such language be in a type size larger than the adjoining type and be initialed by the client."	Memorandum 2013-47, Exhibit p. 4 (comments of Sidney Tinberg).
General Approach C-11. The Legislature could require the mediator and/or counsel to warn mediation participants at the beginning of a mediation that they must memorialize any fee adjustment in their settlement agreement if they want to be able to enforce it. Evidence re compliance with this disclosure requirement would be admissible and subject to disclosure.	Staff brainstorming in Memorandum 2013-47, p. 13 (just an idea, not a staff recommendation).

Compilation of Possible Approaches

APPROACH	Source of Idea
General Approach C-12. The Legislature could require every mediated	Staff brainstorming based on point made by
settlement agreement to specify whether any of the mediation participants agreed	Rachel Ehrlich at the 6/4/15 CLRC meeting
to a fee adjustment during the mediation. The terms of any fee adjustment would	(just an idea, not a staff recommendation).
have to be memorialized in the mediated settlement agreement or in a separate	
document. That document would be admissible in court and subject to disclosure if	
necessary for enforcement purposes; the document would not be protected by the	
mediation confidentiality statute.	

CATEGORY D: OTHER IDEAS

In addition to ideas about modifying the mediation confidentiality statutes (Categories A and B) and ideas about creating disclosure requirements (Category C), various other ideas have come up during the Commission's study. Such ideas are listed below (Category D).

Approach	Source of Idea
General Approach D-1. Empirical study. The Legislature could require an empirical study of specified aspects of mediation confidentiality.	See, e.g., Second Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Kazuko Artus); staff brainstorming in Memorandum 2015-5, pp. 49-50 (just an idea, not a staff recommendation). For discussion of difficulties inherent in empirical studies of mediation confidentiality, see Memorandum 2015-5, pp. 4-8. For discussion of existing data on the topic, see <i>id.</i> at 8-21.
General Approach D-2. Daily time limit. To help prevent coercion, the	Staff brainstorming (just an idea, not a staff
Legislature could place a time limit on each day's mediation session (e.g., no more than 8 hours of mediation per day). Evidence re compliance with the time limit would be admissible and subject to disclosure. There could be an exception	recommendation), in response to concern voiced by Eric van Ginkel re overly long mediation sessions. See Memorandum 2015-
to the time limit for exigent circumstances.	13, p. 6 & Exhibit p. 49.
General Approach D-3. Modify the standards for attorney malpractice claims involving mediation communications. For example, a statute could require a showing of willful misconduct, instead of negligent misconduct.	This idea was raised by Ron Kelly without stating his personal view. See Memorandum 2014-6, Exhibit p. 3.
(Presumably this approach would have to be coupled with some modification of the mediation confidentiality statutes to have any impact.)	
General Approach D-4. Enact a provision explicitly stating that a mediation party is entitled to bring a support person along to the mediation.	See UMA Section 10.
	For discussion of this idea, see Memorandum 2015-35, pp. 40-41.

CATEGORY D: OTHER IDEAS

Approach	Source of Idea
General Approach D-5. Cooling-off period. The Legislature could enact a statute that establishes a mandatory "cooling-off period" after a mediation, during which the parties to a mediated settlement agreement could think over the terms, or get more information, and then rescind the agreement if they change their minds about it. For examples of mediation cooling-off periods, see Cal. Ins. Code § 10089.82(c) (3-day cooling-off period for mediation of earthquake insurance dispute); Ga. Model Ct. Mediation R. XII(d)(2) (party who had no attorney at court-ordered mediation has 3 days after signing of settlement agreement to make objection); Minn. Stat. § 572.35 ("a mediated settlement agreement between a debtor and creditor is not binding until 72 hours after it is signed by the debtor and creditor, during which time either party may withdraw consent to the binding character of the agreement."). See also former Fla. Fam. Law R. Proc.	This idea was raised by Ron Kelly without stating his personal view. See Memorandum 2014-6, Exhibit p. 3. Ron Kelly and John Warnlof also raised the idea as a possible solution at the 4/9/15 CLRC meeting. See also Memorandum 2015-35, pp. 41-44 (summarizing scholarly views on mediation cooling-off periods).
12.740(f)(1). General Approach D-6. Develop a mediator regulation system for California.	See First Supplement to Memorandum 2014-27, Exhibit pp. 4-23 (article by Jack Goetz & Jennifer Kalfsbeek Goetz); Memorandum 2014-46, Exhibit p. 3 (further comments of Jack Goetz & Jennifer Kalfsbeek Goetz). For descriptions of mediator regulatory systems in Florida, Georgia, Maine, Minnesota, North Carolina, and Virginia, see P. Young, <i>Take It or Leave it, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field, 21 Ohio St. J. Disp. Resol. 721 (2006). See also Tenn. S.Ct. R. 31 § 11(b)(14)-(18) (proceedings for discipline of Rule 31 Mediators).</i>

CATEGORY D: OTHER IDEAS

Approach	Source of Idea
General Approach D-7. Require mediation to take place within 30	Testimony of Paul Rieker (4/9/15 CLRC meeting).
days of when a lawsuit is filed, so that attorneys do not run up	
fees.	
General Approach D-8. Enact a statute stating that a person	Testimony of Ron Kelly (6/4/15 CLRC meeting).
cannot serve as both a mediator and a referee in the same case.	

Study K-402 July 31, 2015

Memorandum 2015-34

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Scope of Study

This memorandum discusses the proper scope of the Commission's ongoing study, which is important to resolve now that the Commission is beginning to prepare a tentative recommendation.¹

The legislative resolution relating to this study calls upon the Commission to provide:

Analysis of the *relationship under current law between mediation* confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant....²

The phrase "attorney malpractice and other misconduct" is subject to multiple interpretations.

At the outset of this study, the Commission considered, but did not definitively resolve, the proper scope of the study.³ It decided to begin its work by focusing on *attorney* misconduct, subject to later adjustment:

The Commission will not define the precise scope of its study at this time. Comments on the proper scope of the study would be helpful. The staff should begin by focusing on attorney malpractice and other attorney misconduct, which is clearly within the scope intended by the Legislature in Assembly Concurrent Resolution 98

^{1.} Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

^{2. 2012} Cal. Stat. res. ch. 108 (ACR 98 (Wagner)) (emphasis added); see also 2014 Cal. Stat. res. ch. 83 (SCR 83 Monning).

^{3.} See Memorandum 2013-39, pp. 33-34 & Exhibit p. 19 (comments of Ron Kelly).

(Wagner & Gorell), 2012 Cal. Stat. res. ch. 108. The Commission may adjust the scope of the study as the study proceeds.4

In researching the various matters that the Legislature specifically requested, the staff initially tried to focus narrowly on attorney misconduct, as the Commission instructed. We quickly found, however, that statutory schemes such as the Uniform Mediation Act ("UMA") "are difficult to understand without taking a broader view, there is comparatively little information on attorney misconduct in mediation, and the available research materials are not organized in a manner facilitating such a focus."5 It also became clear that materials involving other types of alleged mediation-related misconduct — such as alleged mediator misconduct or alleged misconduct by other mediation participants, particularly professionals — might be instructive by way of analogy even if the Commission decided to stick with its focus on attorney misconduct.⁶

Thus, the background research for this study was wide-ranging and timeconsuming. As the staff pointed out early on, however, "[t]hat research approach does not imply anything about the appropriate breadth or narrowness of whatever reform (if any) the Commission should ultimately recommend in this study."⁷

Because the Commission is now in the process of crafting a tentative recommendation, it is time to resolve that matter. To do so, it may be helpful to consider four key questions:

- In requesting this study, specifically which topic did the Legislature want the Commission to examine and address?
- What means did the Legislature authorize the Commission to use to address that topic?
- What is the Commission authorized to do based on other sources of authority? What is beyond the Commission's authority?
- What is a wise position in terms of (1) allocating the Commission's limited resources, and (2) achieving sufficient consensus to be a realistic legislative proposal?

We address each question in order below.

^{4.} Minutes (Aug. 2013), p. 3.5. Memorandum 2014-14, p. 6.

^{6.} See Memorandum 2014-35, pp. 2-3.

^{7.} Memorandum 2014-14, p. 6 (emphasis in original).

IN REQUESTING THIS STUDY, SPECIFICALLY WHICH TOPIC DID THE LEGISLATURE WANT THE COMMISSION TO EXAMINE AND ADDRESS?

Many different types of bad behavior could theoretically occur during a mediation. In addition, mediation communications might provide evidence of misconduct that occurred earlier than, or separate and apart from, the mediation process. The resolution relating to this study refers to "the relationship between mediation confidentiality and attorney malpractice and *other* misconduct" It is important to consider what the Legislature meant when it referred to "other misconduct."

To assist the Commission in resolving that issue, we first describe some different types of misconduct that could occur during mediation. Next, we raise a number of questions to highlight ambiguities in the phrase "other misconduct." We then examine available evidence bearing on the proper scope of this study.

Types of Mediation Misconduct

At one extreme, a mediation participant could commit a violent criminal act while attending a mediation session, such as assaulting another participant. Alternatively, a mediation participant could commit a nonviolent criminal act, such as stealing money or a cell phone from another participant's unattended briefcase.

At another extreme, a mediation participant might be faulted for failing to comply with a court order requiring mediation. Some types of noncompliance might be objectively determinable without invading mediation communications. For example, if a party fails to attend a court-ordered mediation, the opponent could prove such noncompliance by introducing testimony about whether the party was present, without getting into the substance of the mediation. That might also be possible, at least to some extent, if a party shows up very late, fails to send a representative with authority to settle, or fails to bring an expert along to a mediation as required by the court. At times, however, a court has sanctioned a party for failing to make a "good faith" attempt to settle at a court-ordered mediation, because the party made no settlement offer or otherwise showed a lack of sincere desire to settle. This type of behavior is only culpable if one assumes that the party is under a duty to make a settlement offer or other

^{8. 2012} Cal. Stat. res. ch. 108 (ACR 98 (Wagner)) (emphasis added); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

^{9.} See, e.g., Avril v. Čivilmar, 605 So.2d 988, 989 (Fla. 4th D.C.A. 1992).

actual attempt to reach a settlement during a court-ordered mediation, not just to attend as ordered by the court.

In between the extremes discussed above, a mediation participant might engage in nonviolent behavior that could be subject to criminal penalties but usually is only pursued civilly. Fraud is an example of this, as well as some types of extortion.

A mediation participant could also engage in noncriminal misconduct at a mediation, such as negligence. Of particular note here, a professional attending a mediation might violate a professional duty or rule, or fail to comply with a professional standard of care. Depending on the applicable professional requirements, this type of misconduct could be committed by any type of professional: The mediator, the attorneys representing clients at the mediation, or a doctor, accountant, insurer, contractor, engineer, or other professional providing advice or otherwise acting in a professional capacity. The conduct may be punishable through a disciplinary proceeding before a professional organization, or, in some instances, through a malpractice suit or other civil proceeding by an injured person.

Questions About Which Types of Misconduct the Legislature Wanted the Commission to Consider

In its resolution directing the Commission to conduct this study, the Legislature asked the Commission to examine "the relationship between mediation confidentiality and attorney malpractice and other misconduct …." How broadly to construe that directive is debatable.

From the quoted language, it is clear that the Legislature wants the Commission to examine malpractice and other *professional* misconduct that may be committed *by attorneys* in the mediation context. Whether the Legislature wants the Commission to go further than that is not immediately obvious.

Should the Commission also seek to address mediator malpractice and other professional misconduct that a mediator might engage in? What about other types of malpractice and professional misconduct in the mediation setting?

Would it be appropriate to include professional misconduct outside the mediation context, which is evidenced by mediation communications? Or mediation misconduct of a professional, which is not committed in a professional capacity?

Should the Commission limit its study to professional misconduct, or should it also address mediation misconduct that is unrelated to professional requirements? If so, how far should it go? Should the study include all noncriminal mediation misconduct? Nonviolent mediation misconduct that is subject to criminal penalties but typically pursued only civilly? All mediation-related criminal behavior?

To what extent, if any, should the Commission explore issues of noncompliance with a court order requiring mediation? Is this an area it should attempt to address?

Evidence Bearing on the Proper Scope of this Study

In considering the above questions, the language of the resolution directing this study is critical. It contains several references to attorneys, attorney misconduct, and attorney organizations. It also refers to "professional ethics" and "client rights," suggesting a focus on conduct in a professional capacity. Those terms are shown in italics below:

Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:

- (a) Analysis of the relationship under current law between mediation confidentiality and *attorney malpractice* and other misconduct, and the purposes for, and impact of, those laws on public protection, *professional ethics, attorney discipline, client rights,* the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:
- (1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, Cassel v. Superior Court (2011) 51 Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.
 - (2) The availability and propriety of contractual waivers.
- (3) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.
- (b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems

appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.¹⁰

The resolution also refers to Evidence Code Section 958, which relates to "an issue of breach, by the *lawyer* or by the client, of a duty arising out of the *lawyer*-client relationship."¹¹

More tellingly, the resolution singles out three California cases for particular attention (*Cassel, Porter*, and *Wimsatt*). Each of those cases involved the intersection of mediation confidentiality and alleged *attorney* wrongdoing in a *professional* capacity:

- In *Cassel*, the plaintiff "sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract" in representing him in a mediation. He alleged that "by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth." 13
- Similarly, in *Porter*, the plaintiffs sued their law firm for "legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment and liability for unpaid wages." ¹⁴ The plaintiffs claimed that the firm gave them incorrect tax advice in connection with a mediated settlement agreement, failed to pay them part of the attorney fee portion of the settlement proceeds as promised during the mediation, and failed to compensate one of the plaintiffs for services rendered as a paralegal. ¹⁵
- Wimsatt was another attorney-client dispute relating to a mediation. The plaintiff alleged that his law firm breached its fiduciary duty by making a low settlement demand against his wishes on the eve of a mediation, which ultimately compromised the plaintiff's ability to obtain a satisfactory settlement.¹⁶

The history of the legislative resolution reinforces the notion that the Commission is supposed to focus on alleged attorney misconduct, particularly such misconduct in the mediation process. The language directing the

^{10. 2012} Cal. Stat. res. ch. 108 (ACR 98 (Wagner) (emphasis added); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

^{11.} Emphasis added.

^{12. 51} Cal. 4th at 118.

¹³ Id

^{14.} Porter v. Wyner, 107 Cal. Rptr. 3d 653, 658 (2010) (footnote omitted) (formerly published at 183 Cal. App. 4th 949).

^{15.} See *id*. at 655-57.

^{16.} See 152 Cal. App. 4th at 202-04, 206.

Commission to conduct this study was originally placed not in that resolution, which contains the Commission's entire Calendar of Topics for Study, but in Assembly Bill 2025.

As introduced in early 2012, AB 2025 would have amended Evidence Code Section 1120 to make the chapter governing mediation confidentiality inapplicable to certain State Bar disciplinary proceedings and attorney-client disputes:

1120....

(b) This chapter does not limit any of the following:

. . . .

(4) The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.

That proposal generated opposition, so the bill was amended to call for a Commission study instead.

The language directing the Commission to conduct the study was essentially the same as the language quoted earlier in this memorandum.¹⁷ The staff of the Assembly Committee on Judiciary analyzed the bill in that form.

Notably, that bill analysis says that the "<u>SUBJECT</u>" of the bill is "*ATTORNEY MISCONDUCT*: MEDIATION PROCEEDINGS."¹⁸ The analysis also identifies the "<u>KEY ISSUE</u>" as: "SHOULD THE COMPLEX ISSUE OF *ATTORNEY RESPONSIBILITY* FOR MALPRACTICE AND MISCONDUCT *IN MEDIATION PROCEEDINGS* BE ANALYZED BY THE CALIFORNIA LAW REVISION COMMISSION WHICH HAS PREVIOUSLY STUDIED AND HAS EXPERTISE ON THE ISSUE OF MEDIATION CONFIDENTIALITY?"¹⁹

AB 2025 passed the Assembly as amended to require this study, but it was never referred to a policy committee in the Senate. Instead, Assembly Concurrent Resolution 98 was amended to include the study proposed in AB 2025, essentially verbatim.²⁰ Subsequent analyses of the legislation shed no further light on the scope of this study; they simply quote the language in the resolution

^{17.} See AB 2025 (Gorell), as amended on May 10, 2012.

^{18.} Assembly Committee on Judiciary Analysis of AB 2025 (May 8, 2012), p. 1 (emphasis added).

^{19.} *Id.* (emphasis added).

^{20.} See ACR 98 (Wagner), as amended on July 3, 2012.

referring to "the relationship between mediation confidentiality and attorney malpractice and other misconduct."²¹

Thus, the analysis of AB 2025 prepared for the Assembly Committee on Judiciary remains the best explanation of the intended scope of this study. Together with the other evidence discussed above, it strongly suggests that the Legislature intended for the Commission to study and provide a recommendation on the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in the mediation process, including, but not limited to, legal malpractice.

WHAT MEANS DID THE LEGISLATURE AUTHORIZE THE COMMISSION TO USE TO ADDRESS THAT TOPIC?

In asking the Commission to examine the topic identified above, the Legislature gave the Commission wide rein to choose the best means of addressing that topic. The final sentence of the resolution says simply: "The commission shall make *any recommendations that it deems appropriate* for the revision of California law to balance the competing public interests between confidentiality and accountability."²²

Notably, the Legislature did not ask the Commission to go in any particular direction, nor did it identify any particular goal or indicate how much weight to assign to any policy interest. It did not limit the Commission to proposing revisions of the mediation confidentiality statutes.

Presumably then, the Commission could propose other types of reforms instead of, or in addition to, revisions of the mediation confidentiality statutes. However, those reforms must relate to effectively addressing the topic in question. Otherwise, they would fall outside the scope of authority for this particular Commission study.

^{21.} See Assembly Appropriations Committee Analysis of AB 2025 (May 25, 2012), p.2; Assembly Floor Analysis of AB 2025 (May 26, 2012), p.1; Senate Floor Analysis of ACR 98 (July 5, 2012), p.2; Assembly Floor Analysis of ACR 98 (Aug. 20, 2012), p.3.

^{22. 2012} Cal. Stat. res. ch. 108 (ACR 98 (Wagner) (emphasis added); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

WHAT IS THE COMMISSION AUTHORIZED TO DO BASED ON OTHER SOURCES OF AUTHORITY? WHAT IS BEYOND THE COMMISSION'S AUTHORITY?

The language authorizing this particular Commission study is Item #23 in the current version of the Commission's Calendar of Topics.²³ It is not the only source of Commission authority of potential relevance here.

In particular, the Commission also has broad authority to study "[w]hether the Evidence Code should be revised" (Item #7 in the Calendar of Topics). That authority is longstanding, and the Commission has prepared many recommendations pursuant to it.

The Commission is also authorized to study "[w]hether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised" (Item #8 in the Calendar of Topics). That broad grant of authority stems from the Commission's previous work on arbitration and mediation, providing a potential basis for making adjustments to legislation that was enacted on its recommendation.

However, if the Commission wishes to activate work pursuant to either of those sources of authority, it would first need to notify the judiciary committees in the Legislature:

[B]efore commencing work on any project within the calendar of topics the Legislature has authorized or directed the commission to study, the commission shall submit a detailed description of the scope of work to the chairs and vice chairs of the Senate Committee on Judiciary and the Assembly Committee on Judiciary, and any other policy committee that has jurisdiction over the subject matter of the study, and if during the course of the project there is a major change to the scope of work, submit a description of the change²⁴

That notice requirement serves to alert the judiciary committees to the Commission's contemplated activities, and affords an opportunity for the committees to provide advice, including the possibility of advising the Commission to refrain from such work because the project appears inappropriate for some reason.

In addition to the sources of authority discussed above, the Commission also has another source of authority that might become relevant in drafting a tentative recommendation for the current study. Under Government Code Section 8298, the Commission "may study and recommend revisions to correct

^{23.} See 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

^{24.} Id. (emphasis added).

technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study."²⁵ The Commission often relies on Section 8298 to fix minor statutory defects it happens to run across in the course of conducting a study pursuant to another source of authority.

WHAT IS A WISE POSITION IN TERMS OF (1) ALLOCATING THE COMMISSION'S LIMITED RESOURCES, AND (2) ACHIEVING SUFFICIENT CONSENSUS TO BE A REALISTIC LEGISLATIVE PROPOSAL?

As explained above, the Commission seems to have authority to study virtually any aspect of alternative dispute resolution or the Evidence Code, but it would need to notify the judiciary committees before undertaking a new project. The current project is to supposed to address the relationship between mediation confidentiality and alleged *attorney* misconduct in a *professional* capacity *in the mediation process*. In addressing that matter, however, the Commission may use any means that it deems appropriate to balance the competing policy interests.

What do those guidelines mean in concrete terms as the Commission examines the reform ideas in the table attached to Memorandum 2015-33 and decides how to frame a tentative recommendation? What is a wise position for the Commission to take in terms of (1) allocating its limited resources, and (2) achieving sufficient consensus to be a realistic legislative proposal (not necessarily successful, but at least realistic enough to warrant the Legislature's attention and justify the time spent preparing it)?

Obviously, a major set of questions concerns whether the Commission's proposal should *solely* address attorney misconduct in a professional capacity in the mediation process. For fairness reasons, it might be appropriate to encompass other types of misconduct in proposing certain types of reforms.

Suppose, for instance, that an attorney, a tax accountant, and an insurer gave the same client the same faulty tax advice during a mediation. If the mediation confidentiality statutes were revised such that evidence of that negligence could be introduced against the party's attorney, but not against the party's accountant or insurer, would that lead to a fair result? Would it instead culminate in inconsistent verdicts and reduced confidence in the justice system?

^{25.} Emphasis added.

The above hypothetical tends to suggest that if the Commission proposes a new exception to the mediation confidentiality statutes, that exception should extend to all professionals, not just attorneys. But different types of professionals are subject to different types of disciplinary systems and other unique considerations.

For example, mediators are entitled to quasi-judicial immunity, a matter that the Commission has already decided, for good reasons, not to attempt to address in this study.²⁶ Thus, if a mediator gave the same faulty tax advice to the same client in the hypothetical situation just discussed, the mediator would not be subject to liability, regardless of whether the mediation confidentiality statutes would permit introduction of the evidence.

Given that consideration, would it make sense to encompass mediators in any new exception to the mediation confidentiality statutes? Would it be preferable to stick more closely to the focus of this study and avoid the potential complications (such as enhanced likelihood of opposition from mediators) inherent in drafting a broader reform?

Similar considerations might apply to other types of professionals. For example, the Ninth Circuit is currently considering a case involving the intersection of mediation confidentiality, an insurer's duty to act in good faith in handling an insurance claim, and the federal requirements of due process.²⁷ If the Commission decided to encompass insurers in a proposed reform, it would have to be mindful of this pending litigation. Should it nonetheless follow that approach?

The staff regards this as a difficult set of questions. We are not inclined to offer specific advice on it at this time.

Nor will we attempt to specify whether each of the possible reforms listed in the table attached to Memorandum 2015-33 would fall within, or be beyond, the proper scope of the Commission's study. There are quite a number of scope issues to consider. To name only a few,

• General Approach B-6 would attempt to clarify the meaning of Evidence Code Section 1119(c), which provides: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation

^{26.} See Memorandum 2015-22, pp. 34-42; Draft Minutes (June 2015), p. 5.

^{27.} See Milhouse v. Travelers Commercial Ins. Co., No. 13-56959 (9th Cir.). For the lower court decision being appealed, see 982 F. Supp. 2d 1088 (C.D. Cal. 2013).

- consultation shall remain confidential." Would that approach fall within the proper scope of this study?
- General Approach B-7 would attempt to revise the mediation confidentiality statutes to expressly address the use of mediation communications in a juvenile delinquency case. Would that approach fall within the proper scope of this study?
- General Approach D-6 would attempt to develop a mediator regulation system for California. Would that approach fall within the proper scope of this study?

It would be time-consuming to analyze each of the scope issues that might arise.

Instead of providing such analysis now, we offer the follow general advice for the Commission to consider:

- The Legislature assigned this study to the Commission in late 2012, in response to concerns presented in a pending bill. It is reasonable to expect that the Legislature would like the Commission to treat the study as a priority matter. In contrast, the Commission's authority to study the Evidence Code (Item #7 in its Calendar of Topics) and its general authority to study alternative dispute resolution (Item #8 in its Calendar of Topics) are longstanding bases of authority, and the Legislature is not expecting any specific action pursuant to them at this time.
- As the Commission well knows, protection of mediation communications is a controversial topic. In general, the broader a legislative proposal, the more likely it is to generate opposition from some sector, and the less likely it is to be enacted and achieve any of the goals of the legislation.
- Oftentimes, in seeking to achieve a legislative objective, it is more
 effective to proceed incrementally than to try to take a single big
 leap.
- The Commission's recommendation in the current study should be cohesive, fair, and sufficiently comprehensive to effectively address the topic assigned by the Legislature.
- In deciding whether to go afield from the topic the Legislature asked the Commission to address, some factors to consider are:
 - (1) How far afield is the idea in question?
 - (2) Is the idea in question potentially controversial? If so, to what extent?
 - (3) Is there a reason to go afield from the assigned topic? If so, how compelling is it?
 - (4) Would it make sense to deal with the idea in a separate study? In a separate phase within this study? In a separate tentative recommendation during the ongoing phase of this study?

The staff will provide more specific advice on the proper scope of this study as requested or otherwise needed as the study progresses.

Respectfully submitted,

Barbara Gaal Chief Deputy Counsel

ARTICLE SUBMITTED BY ROBERT J. FLACK

(reprinted at his request)

From:

https://www.linkedin.com/pulse/dec-1-los-angeles-thurs-circ-mediation-hearing-robert-j-flack-esq-



Dec. 1 Cal Law Revision Commission LA Hearing - Reagan Bldg 1:30 PM

Time to Choose:

- 1. Destroy Mediation Confidentiality
- 2. Safe Harbor Mediation Agreements

ADRFlack@gMail.com





Robert J. Flack, Esq. Arbitrator, Mediator, Litigator, General Counsel (Complex Commercial, IP, Tech. Licensing, Gov't, Construction, Intri'l)

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Dec 1 Los Angeles (Thurs) CLRC Mediation Confidentiality Hearing

Nov 1, 2016 84 views & 10 Likes 🖵 1 Comment in 🖪 💟

Time to Pick Best Alternatives.

The Dec 1 CLRC Hearing in LA may be a turning point.

The California Law Revision Commission has been studying ways of reducing the traditional confidentiality of Mediation for the last few years by changing the Evidence Code. About 3000 pages of information has been generated and approximately 15 hearings have been conducted. No acceptable solution has been found!

Everyone's exhausted. And, more importantly, most agree that they are exhausted. The Commission has tracked down nearly every possible approach to reducing Confidentiality. And yet, the fact remains that Confidentiality is essential to effective Mediation. Trust is key.

CLRC Got it Right Before.

The current Evidence Code is the result of the very professional and comprehensive work of the CLRC in the mid 1990's. It has served us well.

However, in response to "dicta" in a concurring opinion, the CLRC was commissioned to "solve" a problem that may only occur very rarely. The solutions considered so far would have destroyed the essence of Mediation, rendering it practically useless.

Like death would put an end to heart disease, few would choose that option.

Finally, Light at the End of the Tunnel!

Instead of changing Mediation Confidentiality, the proposal to have Pre-Mediation Confidentiality Agreements provide a "Safe Harbor" protecting Confidentiality is finally being seriously discussed. It's only taken 3 hearings and 6 months for this benign, proactive solution to be considered.

Someone said that Americans will ultimately do the right thing, but only after all other alternatives have been considered. The California Law Revision Commission has considered many alternatives, each presenting more problems than it might ever solve.

The December 1 CLRC Hearing in LA is Critical

The Pre Mediation Agreement Safe Harbor is now being considered. Great! But, until the final vote, Mediation Confidentiality remains at risk.

Mediation remains at risk.

For more information, contact ADRFlack@gMail.com

#Arbitration, #Mediation, #Confidentiality, #Privacy, #California, #Constitutional #Right of Privacy, #ADR

EMAIL FROM RON KELLY (10/13/16)

Re: Study K-402 — Alternative Compromise Package

Dear Chairperson Lee, Commissioners, and Staff,

Alternative Compromise Package

The purpose of this letter is to put in writing and discuss the three elements of the compromise package which I first recommended to the Commission at your April 2016 meeting, and again recommended at your last meeting in September. These are:

1. Reverse the Supreme Court decision in Cassel by codifying instead the appellate decision in that case. Adopt Option A-4-a on page T-5 of staff's Memo 2015-33. Available here:

http://www.clrc.ca.gov/pub/2015/MM15-33.pdf

2. Require a plain English informed consent notice. Make sure consumers, employees, and other participants understand their most important protection against signing a settlement based on mediation communications. That is — if you're settling because you accept an important statement in mediation as true, your best protection is to put it in the settlement agreement and to make the settlement contingent on its factual accuracy. Adopt Option C-5 on page T-27 of that same memo, 2015-33. My suggested discussion draft, rationale, and precedents for a statute on this appear as Exhibit pages 1 and 2 of staff's Memo 2014-06. Available here:

http://www.clrc.ca.gov/pub/2014/MM14-06.pdf

3. If the Commission determines that modification of an attorney/client fee agreement in mediation is a significant problem that would not be sufficiently addressed by the notice above, then address the alleged breach of oral contract issue directly, and separately from alleged malpractice. Attorneys will likely strongly oppose having to discuss modifying their fee agreements in every mediation when it's not an issue in most, but the Commission can adopt option B on page 25 of staff memo 2015-45. Available here:

http://www.clrc.ca.gov/pub/2015/MM15-45.pdf

Discussion

The Commission has the opportunity to accomplish its legislative assignment while expanding protections for disputants <u>well beyond</u> what its current proposal would do. The compromise package above would also be much less controversial, because <u>none of these three elements would remove the predictable protection for candid communications in mediation which current law provides. I have reason to believe that if the Commission and the Legislature return the state of the law to what it was before the Supreme Court's reversal of the appellate decision in Cassel, many of the stakeholders who have weighed in with the Commission could live with that.</u>

The Court of Appeal's decision in Cassel cited the current Evidence Code section 1122(a)(2), and found that its decision was consistent with that section. I recommend the Commission take care to codify the appellate decision in a way that's consistent with

1122(a)(2). This section already provides that <u>a mediation communication may be</u> admitted **IF**:

"(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants [in this case, on behalf of the client, Mr. Cassel], those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation."

Otherwise, you don't solve the central problem that's always been at the heart of this. Suppose I'm an unhappy client later accusing my lawyer of pressuring me to settle in mediation when I shouldn't have, or of pressuring me to refuse a settlement when I should have accepted it. My accused lawyer will naturally want to repeat later in court those conversations during the mediation between client and lawyer which would validate the basis of his recommendation, namely "Here's what we're learning from the other side, and why you really should accept their offer (or reject it)." The content of these is routinely other people's confidential mediation communications.

Codifying the appellate decision on this basis would mean that lawyer and client can repeat things later in court which they said to each other, before or after the mediation, that do not disclose other people's communications. This is also consistent with the request from the California Judges Association. They urged in their March 28, 2016 letter to the Commission that "IF the statutory confidentiality of the private mediation process is going to be invaded then...[disclosure of] [m]ediation statements made by persons other than the client alleging misconduct and the lawyer defending against the claim must be prevented."

The Supreme Court decision in the Cassel case overturned a well-reasoned appellate decision and led to the Commission's current Study K-402. Among many others, I spoke recently with Mr. Cassel's attorney, Mr. Makarem. I sought his views on the compromise package above. He pointed out that even in Mr. Cassel's case, and even without the ability to introduce mediation communications following that Supreme Court decision, when his case went to trial the jury nevertheless returned a verdict in Mr. Cassel's favor with regard to liability which included all issues related to mediation.

The Commission has heard from hundreds of organizations and individuals opposed to the Commission's current proposal. They argue that the possible benefit in a few cases is small and that the Commission has not seen evidence of a problem occurring frequently enough to warrant the damage they argue will result. Some of these stakeholders may continue to oppose any new exception.

However, like all statutes in Evidence Code Division 9, our current mediation laws were based on difficult public policy choices. They have been regularly challenged by thoughtful people with good arguments. As you know, AB 2025 was the 2012 legislation sponsored by the Conference of California Bar Associations to reverse the Supreme Court's Cassel decision. It was the original impetus for Study K-402. CCBA's legislative representative has identified legitimate issues to the Commission, and compromise is normally an essential part of the legislative process. If Commission staff thinks it prudent, staff could draft a statute based on the original text of AB 2025, and make

relatively small additions to achieve the first point above in this suggested compromise package.

Useful Model of Compromise on Proposed Exception

Over the past two years, a workable compromise has developed on another more recent challenge to the current mediation laws. This challenge also originated in the Conference of California Bar Associations, this one at its 2015 annual conference. If enacted, the compromise will also create a new exception. It will almost certainly be introduced in the Legislature shortly. That compromise has so far gained the support of many of the affected stakeholders around the state, including the CCBA at its 2016 annual conference, and many litigators and mediators specializing in the area of law it would affect. I helped organize support for it and expect to continue. That compromise is also based on codifying a well-reasoned appellate decision interpreting our current mediation confidentiality laws.

If enacted as approved by the CCBA, it will add a new exception under Evidence Code section 1120 to read:

"In family law actions, declarations of disclosure required by sections 2104 and 2105 of the Family Code shall remain admissible even if prepared for the purpose of, in the course of, or pursuant to mediation or a mediation consultation."

and state that:

"The Legislature finds and declares that the intent of this legislation is to codify the rule of Lappe v.Superior Court (2014) 232 Cal.App.4th 774, review denied (Mar. 11, 2015)."

This will provide that the sworn declarations of assets that divorcing parties must submit will be <u>fully admissible later even when those documents are mediation communications</u> <u>prepared in the course of mediation</u>. Parties will be able to challenge the factual accuracy of these statements later in court.

This same approach offers a workable model for the Commission's current study. The aim of point 2 in the suggested compromise package above is to <u>make sure consumers</u>, <u>employees</u>, and all mediation participants know they have a similar right to that which divorcing spouses will gain under the new CCBA-sponsored exception in family law cases. For twenty years, settling participants have been able to challenge later in court the factual accuracy of any statement incorporated into a mediated settlement as a condition of that settlement. I respectfully request that staff carefully evaluate the merits of the compromise package outlined above in preparing Memorandum 2016-59, and that the Commission actively consider it at its next meeting as an alternative to its current proposal.

Respectfully submitted, Ron Kelly 2731 Webster St. Berkeley, CA 94705 510-843-6074 ronkelly@ronkelly.com

ACKNOWLE	OGMENTS CONCERNING	MEDIATION CONFIDENTIALITY	
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[Participant's Name]	[Role in Mediation]	[Signature]	